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In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Henry Kissinger, Richard M. Nixon, John N. Mitchell and H. R. Haldeman, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-53a) is not yet reported. The opinions of the district court (Apps. B and C, *infra*, 54a-59a, 60a-77a) are reported at 424 F. Supp. 838 and 434 F. Supp. 1193.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 78a-79a) was entered on July 12, 1979. On October 2, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the President and his closest advisors, including the Attorney General, are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority.

2. Whether these federal officers are entitled to a qualified immunity as a matter of law for authorizing electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

3. Whether the Court's decision in *United States* v. *United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create a personal damages liability for federal officers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. 2511(3)[1] provided, in pertinent part:

> (3) Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of

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[1] 18 U.S.C. 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute, which establishes procedures for the conduct of electronic surveillance for national security purposes, was enacted nine years after the events that gave rise to this litigation.

the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

STATEMENT

1. Between February and April of 1969, President Richard M. Nixon, Assistant to the President H. R. Haldeman, and other high administration officials became concerned that leaks to the press of certain foreign policy documents and classified information were eroding "the candor of foreign governments in dealings with this country" (App. A, *infra*, 4a). The information that was being improperly divulged revealed the foreign policy position of the United States on several important and sensitive issues, including strategic arms limitations talks then under way with the Soviet Union, peace proposals for the Middle East, the termination of our then-substantial military involvement in Viet Nam, and the return of the island of Okinawa to Japanese control (Jt. App. 106-111, 120-121; see App. C, *infra*, 61a).[2] The President and his advisors believed that the untimely release of this classified information might seriously jeopardize the government's foreign policy initiatives in these areas (Jt. App. 120). They also believed that the source of these leaks was likely to be personnel at the Na-

[2] "Jt. App." refers to the Joint Appendix filed in the court of appeals.

tional Security Council ("NSC") because the leaked information included certain statements made during confidential discussions within that agency (*id.* at 129-132).

Accordingly, on April 25, 1969, President Nixon met with Attorney General John N. Mitchell, NSC Director Henry Kissinger and FBI Director J. Edgar Hoover to discuss methods for controlling security breaches at the NSC. Hoover advised President Nixon that electronic surveillance, including wiretaps, was an effective method of determining the source of leaks and had been used by previous administrations for similar reasons (Jt. App. 126, 136). Attorney General Mitchell gave his opinion that the use of wiretaps to discover the source of the leaks would be legal (Jt. App. 126). The President thereupon authorized a program of electronic surveillance and adopted three criteria to identify individuals who would be investigated: (a) access to classified material that had been leaked; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of leaked information (Jt. App. 137; see App. C, *infra*, 61a). At President Nixon's request, Kissinger prepared a list of officials who had access to leaked information (Jt. App. 112). Morton Halperin, Chief of the NSC Planning Group, was on that list (*ibid.*).

On May 9, 1969, an article incorporating classified information concerning United States bombing missions in Cambodia appeared in the *New York Times*

(Jt. App. 108-109). At the President's request, Kissinger called Hoover that same day and asked him to investigate the source of the security leak (*id.* at 46, 147-148). Hoover informed Kissinger that Halperin was a possible source (Jt. App. 49-50) and a wiretap was installed on Halperin's home telephone that evening (*Hearings* at 23).[3] Acting pursuant to the President's authorization, Attorney General Mitchell approved the wiretap on May 12, 1969 (Jt. App. 51-53). While the wiretap continued, Halperin resigned his full-time position with the National Security Council in September 1969 and resigned as a consultant to Kissinger in May 1970. After additional surveillance failed to reveal that Halperin was the source of the leaks, the wiretap was removed from his phone on February 10, 1971 (Jt. App. 83).

2. The existence of this wiretap was revealed during the trial of Daniel Ellsberg in May 1973 (Jt. App. 212-213). After learning of the wiretap, Halperin and his wife and children (the respondents) filed this action in the United States District Court for the District of Columbia, alleging that the wiretap was unlawful under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* The suit was brought against petitioners and other federal

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[3] "*Hearings*" refers to *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974).

officers[4] and sought money damages and declaratory and injunctive relief.

On cross motions for summary judgment, the district court concluded that respondents had established a right to recover under the Fourth Amendment but not under Title III. With regard to Title III, the court stated that "[i]nterpretation of this statute and of the President's domestic power thereunder" was entirely unsettled prior to *United States* v. *United States District Court*, 407 U.S. 297 (1972), and that petitioners "should not be held to have acted at their peril in this vacuum," especially in light of "the 30-year history of similar Executive actions" (App. C, *infra*, 66a). The court thus held that petitioners were entitled to a qualified good-faith immunity defense as a matter of law to respondents' statutory claims (*id.* at 66a-67a).

The district court concluded, however, that the wiretap constituted an unreasonable search in vio-

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[4] In addition to petitioners Kissinger, Nixon, Mitchell and Haldeman, the complaint named as defendants John Ehrlichman, Alexander Haig, William Sullivan, Robert Mardian, Jeb Stuart Magruder and the Chesapeake and Potomac Telephone Company. The district court granted summary judgment in favor of these defendants (App. C, *infra*, 74a-77a). The district court also awarded summary judgment to Kissinger because his role in the wiretap was "inactive" and he had no "oversight authority" (*id.* at 75a). The court of appeals reversed the grant of summary judgment to Kissinger, holding that there were genuine issues of material fact concerning his role in installing and maintaining the wiretap (App. A, *infra*, 49a-50a). We do not seek review of the latter ruling in this petition.

lation of the Fourth Amendment.[5] The court recognized that "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information" but held that, "even granting the inapplicability of the general warrant requirement [to this surveillance]," the wiretap of respondents' telephone was constitutionally unreasonable because it continued for 21 months without an effort to minimize the number or type of conversations overheard (App. C, *infra*, 68a-70a).

The district court determined that neither the President, the Attorney General, nor the other defendants were entitled to an absolute immunity from damages liability for authorizing an electronic surveillance in violation of the Fourth Amendment (App. C, *infra*, 70a & n.8). In addition, although the court found that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (App. B, *infra*, 56a), it held that petitioners were not entitled to a qualified good-faith immunity from damages liability because "their activities relating to the wiretap continuance [were] in violation of established Fourth Amendment rights" (App. C, *infra*, 73a). Because respondents did not allege any actual injury from

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[5] The district court accepted petitioners' contention that the requirements of *United States* v. *United States District Court*, *supra*, were either inapplicable to national security surveillances or, in the alternative, should not be applied retroactively to the facts of this case (App. C, *infra*, 65a-67a).

the wiretap, however, the court awarded only nominal damages of one dollar (*id.* at 56a).[6]

3. The court of appeals reversed the judgment of the district court and remanded for further proceedings. The court held that petitioners' failure to obtain a warrant prior to conducting electronic surveillance of persons suspected of divulging classified information to authorized persons, and their failure to terminate such surveillance within a reasonable period of time, constituted violations of the Fourth Amendment that gave rise to a cause of action in damages against these federal officers (App. A, *infra*, 29a-32a). The court of appeals also agreed with the district court that (i) the President and his close advisors (including the Attorney General) are not entitled to an absolute immunity with respect to their authorization and implementation of such surveillance and (ii) petitioners are not entitled to a qualified immunity as a matter of law with respect to the continuation of the surveillance for an unreasonable period because "there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution" (App. A,

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[6] The district court also ordered petitioners to insert certain exonerating materials into respondent Morton Halperin's security file and enjoined petitioners from making any use of the intercepted communications (App. B, *infra*, 57a-58a). These portions of the court's judgment were not appealed. Hence, the only remaining issues in this case concern petitioners' personal liability in money damages.

infra, 41a).[7] The court remanded the case to the district court for a determination whether petitioners acted in good faith in authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, *supra* (App. A, *infra*, 31a).

On respondents' statutory claims, the court of appeals remanded for a determination whether, as respondents asserted, the primary purpose of the surveillance was not to "protect[] national security information against foreign intelligence activities" (App. A, *infra*, 28a). The court held that if some other purpose was intended, petitioners' failure to obtain a warrant would subject them to damages liability under Title III (18 U.S.C. 2511, 2520) (App. A, *infra*, 27a-28a).[8] Finally, the court held that more

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[7] The court of appeals mistakenly implied that the district court had found that the wiretap was continued in bad faith (App. A, *infra*, 41a). The district court did not make such a finding. To the contrary, it held that, although petitioners' conduct was not reasonable under the Fourth Amendment (App. C, *infra*, 73a), the conduct was not engaged in recklessly or with "malicious disregard of [respondents'] rights" (App. B, *infra*, 56a). See also note 27, *infra*.

[8] We do not seek review of this portion of the decision of the court of appeals at this time only because we think that the district court already has determined that the primary purpose of the surveillance was to protect national security information from exposure to foreign intelligence activities (App. C, *infra*, 61a-62a) any that any proceedings on remand would support that ruling. Public disclosure of confidential material achieves the same result as espionage, in that the material is received by foreign intelligence activities. Ac-

than nominal damages should be awarded if, on remand, respondents can establish emotional distress or other intangible injury (*id.* at 33a-35a).

REASONS FOR GRANTING THE PETITION

This case presents issues of exceptional importance that should be decided by this Court. Before the lower court decisions in this case, no court had ever ruled that the President of the United States may be held personally liable in money damages for the official acts that he takes during his conduct of office. The decision of the court of appeals threatens seriously to interfere with the proper administration of the Executive Branch by the President. Further review by this Court is warranted not only by the signal importance of the questions that are presented, but also because the decision below conflicts with decisions of this Court and other courts of appeals.

1. a. The most significant and unprecedented holding of the court of appeals is its conclusion that the President and his closest personal advisors, including the Attorney General, may be held liable in money damages for constitutional violations that occur in the performance of the President's official responsibilities. There can be no dispute about the constitutional authority of the President to protect

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cordingly, even under the analysis of the court of appeals, no liability can be established under Title III. In this petition, we seek review only of issues relating to respondents' claim that petitioners are personally liable in money damages for the alleged constitutional violations.

the national security and conduct our Nation's foreign relations.[9] It has long been recognized that these are areas committed to the Executive Branch by Article II and that, in carrying out his responsibilities, the President must be accorded a broad discretion. See, *e.g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

It also has long been recognized that in the exercise of these and other discretionary executive powers, the Constitution requires that the President not be personally accountable in judicial proceedings for his conduct of office. Members of the First Congress, many of whom were instrumental in the drafting of the Constitution, concluded that no action could be

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[9] The success or failure of the President's conduct of foreign affairs necessarily depends, in large part, on the confidentiality of communications within the government and with foreign powers. The Nation's first President observed that "[t]he nature of foreign negotiations requires caution, and their success must often depend on secrecy * * *." 1 J. Richardson, *Messages and Papers of the Presidents* 194 (1896), quoted in *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936). "[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy." *New York Times Co.* v. *United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). Accordingly, in order to exercise effectively his authority to conduct foreign relations, the President must have discretion to act to protect the confidentiality of information bearing on the exercise of that authority. See also *Katz* v. *United States*, 389 U.S. 347, 359-360 (1967) (Douglas, J., concurring).

instituted personally against the President because to permit a single judge or court to exercise such authority could "stop the whole machine of government." W. Maclay, *Sketches of Debate in the First Senate of the United States* 152 (1880). As Justice Story remarked:

> There are * * * incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention while he is in the discharge of the duties of his office; and for this purpose, *his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience.* This decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.

Story, *Commentaries on the Constitution of the United States* § 1563 at 418-419 (1883: 1970 De Capo Press reprint) (emphasis supplied). In light of this tradition, few litigants had ever attempted to sue the President for damages based on his official conduct, and on the isolated occasions when such actions have been filed, the federal courts consistently have ruled that the President may not be held personally accountable. See *Reese* v. *Nixon*, 347 F. Supp. 314,

316-317 (C.D. Cal. 1972), aff'd in relevant part, No. 72-3070 (9th Cir. May 3, 1974); *Davis* v. *Nixon*, No. 73-1520 (C.D. Cal. June 18, 1974). Indeed, at least before this Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), it was generally held that all high-ranking executive officials of the federal government were absolutely immune from personal damages liability for their discretionary official acts. See *Barr* v. *Matteo*, 360 U.S. 564, 571-575 (1959) (plurality opinion); *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950); W. Prosser, *The Law of Torts* 988 (4th ed. 1971) (collecting cases).[10]

The court of appeals concluded, however, that as a result of this Court's decision in *Butz* v. *Economou*, the President is entitled to only a qualified good-faith immunity in damages actions challenging his official acts. The court of appeals reasoned that, under *Butz*, executive officials generally are entitled to only a qualified good-faith immunity unless the officials are

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[10] Moreover, it had also generally been held that, if the absolute immunity of the President and other "highly placed executive officers of the government, when acting in line of duty, is to serve its intended purpose, it must extend to subordinate officials * * * who execute the official's orders." *Heine* v. *Raus*, 399 F.2d 785, 790 (4th Cir. 1968). See also *Doe* v. *McMillan*, 412 U.S. 306, 320 (1973) (Public Printer is absolutely immune from damages liability for carrying out functions that, if performed by a Congressman, would be within the protections of the Speech or Debate Clause); *Spaulding* v. *Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979) (probation officer is absolutely immune from damages liability because he acts "at the direction of the court").

involved in adjudicative or prosecutive functions (App. A, *infra*, 36a)[11] and that the President is not entitled to any greater immunity than is generally accorded to his subordinates because he cannot be set "apart from * * * other high Executive officials" (*id.* at 42a).[12] The court stated that according the President only a qualified immunity will not "hinder effective governance of the nation" (*id.* at 45a) because "suits that may successfully be pursued against a President will be quite rare" (*ibid.*).

The decision of the court of appeals is a disturbing one, both in its assertion of a judicial authority to conduct routine oversight of the President's conduct of office in personal damages actions and in its disregard of the express limitations of this Court's hold-

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[11] For this reason alone, the court of appeals concluded that the Attorney General and the President's close advisors have only a qualified immunity when they render legal advice to the President or act for the President in authorizing a national security wiretap (App. A, *infra*, 36a-41a).

[12] The court of appeals noted that the chief executive officers of the states enjoy only a qualified immunity from damages liability under 42 U.S.C. 1983 (App. A, *infra*, 48a n.144, citing *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)). But the question of the immunity of state officials under Section 1983 presents interests of a different kind and nature than are involved here. See note 17, *infra*.

The court of appeals also stated that its decision to accord the President only a qualified immunity is "mandated by our tradition of equal justice under law" (App. A, *infra*, 49a). But it is hard to square this assertion with the court's recognition that judges and legislators are absolutely immune for their official acts (*id.* at 36a, 42a).

ing in *Butz*.[13] The Court held in *Butz*, that, "[a]lthough a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, * * * there are some officials whose special functions require a full exemption from liability." 438 U.S. at 508.[14] As the Court explained in *Butz*, the common law accords an absolute immunity when it is required by "public policy" and is "essential for the conduct of the public business." *Id.* at 506, 507.[15]

First, in suggesting that exposure to liability will not hamper the President because successful suits against him "will be quite rare" (App. A, *infra*, 45a), the court of appeals did not adequately examine the justifications for absolute presidential immunity in personal damages actions. The fact that successful

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[13] Judicial review of the President's conduct of office in personal damages actions would threaten the principle of separation of powers. *Reese* v. *Nixon*, *supra*, 347 F. Supp. at 316-317.

[14] Indeed, four Justices in *Butz* would have held that all "high-ranking" federal officers are entitled to an absolute immunity from constitutional torts when "acting within the outer limits of their authority." 438 U.S. at 518 (Rehnquist, J., concurring in part and dissenting in part).

[15] The court of appeals' emphasis on the absence of any specific immunity for the Executive Branch in the Constitution (App. A, *infra*, 42a-43a) is thus simply misplaced. There is no specific constitutional immunity for the Judicial Branch, yet judges are absolutely immune from damages liability for acts taken in the conduct of their office. See *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871).

suits against the President are exceedingly unlikely counsels strongly *in favor of*, not against, according the President an absolute immunity in damages actions challenging his official acts. As this litigation reveals (see notes 7, 8, *supra*), it is not difficult for an aggrieved plaintiff to allege that the President has taken some official action with malicious intent. If only a qualified immunity is available to the President, the allegations of improper motive would have to "be inquired into [and the President] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871).

Thus, as courts often have recognized in analogous contexts (*ibid.*), it is not the liability that might result in the rare suit where malice is shown, but the burden of defending in all personal actions alleging "malice," that threatens serious interference with the President's conduct of office. Even the court of appeals recognized that there would be "extraordinary practical difficulties confronting a President who is charged in such a suit" (App. A, *infra*, 47a). The court suggested only that district courts "should be sensitive" (*ibid.*) to these difficulties in readying the case for trial.[16]

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[16] As this Court reecntly noted in *Herbert* v. *Lando*, No. 77-1105 (Apr. 18, 1979), a plaintiff who bears the burden of proving malice must be given a fair opportunity to question the defendant to develop the relevant evidence. The same rule would presumably apply when it is the defendant who

Furthermore, we submit that the factors emphasized by this Court in according an absolute immunity to judges, prosecutors and legislators are applicable to the President as well. Most important, "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler* v. *Pachtman*, 424 U.S. 409, 424-425 (1976). The President sits at the apex of our system of government. It is no exaggeration to suggest that every day he must make discretionary decisions on matters that affect the lives of virtually every American citizen. Because the easier or less controversial decisions are disposed of at a lower level, it is the rare presidential decision that does not involve difficult choices among reasonable alternatives or have a substantial adverse impact upon some segment of the Nation. The President's decision-making should be motivated solely by considerations of the public welfare, not by fear of personal liability in

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bears the burden of proving his subjective good faith. Thus, a ruling limiting the President to a qualified immunity might require the President to attend a deposition or answer interrogatories in a private civil suit, at the expense of his duties as Chief Executive, or risk the imposition of sanctions, including a default judgment. See Fed. R. Civ. P. 37(b). (Indeed, the court of appeals candidly acknowledged that "[q]uestions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved" (App. A, *infra*, 38a)). This disruption of daily activities might be justified when dealing with a subordinate executive official, but it should not be countenanced in the case of the President.

damages. See App. A, *infra*, 53a (Gesell, J., concurring).

Of course, there is also an undeniable public interest in avoiding abuses of presidential authority. But, as the court of appeals recognized, the occasions of such abuse are likely to be rare. Moreover, there are substantial independent safeguards—such as public opinion and the political and impeachment processes—that effectively minimize the likelihood of intentional presidential misconduct and that can remedy such misconduct should it arise.[17] See *Butz* v. *Economou*, *supra*, 438 U.S. at 512. In view of these safeguards, the importance of preserving presidential discretion clearly outweighs "the need for private damages actions as a means of controlling unconstitutional conduct." *Ibid.* The President should be accorded an absolute immunity so that he can exer-

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[17] These safeguards are substantial. Article II, paragraph 2 of the articles of impeachment recommended by the House Judiciary Committee against petitioner Nixon was based precisely upon the acts alleged by respondent Halperin in this suit. See H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146-150 (1974).

The fact that Congress can investigate and impeach federal officers, but has no similar power with respect to state officers, distinguishes this case from *Scheuer* v. *Rhodes*, *supra*. The important national political checks applicable to the President are also less effective as applied to local or state officials. In *District of Columbia* v. *Carter*, 409 U.S. 418, 429-430 (1973), the Court explained that "the rationale underlying Congress' decision not to enact legislation similar to [42 U.S.C.] § 1983 with respect to federal officials [was] the assumption that the Federal Government could keep its own officers under control * * *."

cise the broad trust imposed in him "without harassment or intimidation." *Ibid.*[18]

b. The defense of absolute immunity, if applicable to the President, should also apply to those whose advice he requires and those who act for him. See note 10, *supra*. The President has the constitutional authority to demand the opinion of his subordinate officers "upon any Subject relating to the Duties of their respective Offices" (Art. II, Sec. 2), and their recommendations are made to him under this constitutional obligation. The Attorney General, in particular, acts not only under this constitutional duty but also under his statutory responsibility to "give his advice and opinion on questions of law when required by the President." 28 U.S.C. 511.[19] Thus, the Attorney General, like a judge, often may be compelled to interpret areas of the law that are ambiguous or unsettled. See *Stump* v. *Sparkman*, 435 U.S. 349, 364 (1978), citing *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 348. The fact that the Attorney General's advice to the President, and his actions on the President's behalf, frequently may involve impor-

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[18] As Judge Hand stated in *Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581, in determining whether high-ranking executive officers should be accorded an absolute immunity for their official acts, "the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

[19] The Attorney General has a similar responsibility to the heads of the executive departments. 28 U.S.C. 512.

tant and controversial issues "is all the more reason that he should be able to act without fear of suit." *Stump* v. *Sparkman, supra,* 435 U.S. at 364. The President cannot be constrained to act only when the lawful course is clear, and the Attorney General's responsibility to assist the President in selecting the seemingly correct course would be seriously inhibited if every recommendation were made under the threat of personal liability in damages.[20]

Moreover, the Attorney General acts under the same public checks as the President (see note 17, *supra*) and under the same professional restraints that this Court has identified in according an absolute im-

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[20] Because the advice rendered by the Attorney General to the President will often involve problems at the cutting edge of the law, it can be expected that courts will not always agree with the Attorney General's opinion. But the court of appeals effectively held that each time the judiciary disagrees with the Attorney General's advice, and suit is brought by an aggrieved party claiming malice of bad faith, the Attorney General must affirmatively establish his personal good faith in the performance of his office. Such a burden would be regarded as intolerable if imposed on the district courts or courts of appeals each time one of their decisions were set aside on appeal (*Bradley* v. *Fisher, supra*). The burden can no more easily be borne by the Attorney General. Under the holding of this case, he must prove his good faith by testimony and evidence submitted in actions brought (as here) years after the relevant events have transpired. And the Attorney General may have to explain to a lay jury why he elected one rather than another interpretation of a complex question of law. The imposition of this burden on the Attorney General "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967).

munity to prosecutors. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 428-429. The minimal risk of intentional misconduct by the Attorney General in performing his responsibilities as the chief legal advisor to the President is outweighed by the need to preserve "the vigorous and fearless performance of [a] duty that is essential to the proper functioning of the [Executive Branch]." *Id.* at 427-428.

2. Even assuming that petitioners have only a qualified immunity for their official acts, the court of appeals erred in concluding that petitioners did not establish their entitlement to that immunity as a matter of law. The doctrine of qualified immunity is premised on the belief that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, *supra*, 438 U.S. at 506-507. It is undisputed that, at the time of the wiretap challenged in this case, there were no "clearly established" constitutional restrictions on the President's use of electronic surveillance for national security purposes.

In 1972, over a year after the wiretap involved in this case had been terminated, this Court noted that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress

or a definitive decision of this Court." [21] *United States* v. *United States District Court*, *supra*, 407 U.S. at 299. See also *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967); *id.* at 363-364 (White, J., concurring).[22] Because there were no clearly established constitutional procedures applicable to national security wiretaps at the time of the events in this case, petitioners should have been accorded a qualified immunity as a matter of law for their official acts. See *Baker* v. *McCollan*, No. 78-752 (June 26, 1979), slip op. 1-2; *Procunier* v. *Navarette*, 434 U.S. 555, 564 (1978).

The court of appeals disagreed with this conclusion, apparently for two reasons. First, without disputing that there was no clearly established warrant requirement for national security wiretaps before 1972, the court of appeals stated that the district court had correctly ruled that the application of the Fourth Amendment's reasonableness requirement to national security surveillances was "established law" at the time of petitioners' actions in this case (App. A, *infra*, 40a-41a). The district court had concluded that the duration of the wiretap on respondents' telephone

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[21] Presidential and Justice Department documents reflecting the history of this practice are set out in Appendix E, *infra*, 8a-85a.

[22] Justice White stated in his concurring opinion in *Katz* (389 U.S. at 363-364) that warrant procedures are inapplicable to national security wiretaps "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."

(21 months) was unreasonable and thus in violation of the Fourth Amendment,[23] a fact that (according to the court) petitioners Mitchell and Haldeman at least should have known (*id.* at 40a).[24] But neither the district court nor the court of appeals cited any preexisting case law or statutes to support the conclusion that the length of the challenged wiretap violated "established law." This is understandable because, in 1970 and 1971, there was literally *no* "established law" concerning what the Fourth Amendment required in the context of national security surveillances. In 1972, in its decision in *United States* v. *United States District Court*, the court noted that such surveillances (407 U.S. at 322):

> involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations

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[23] The court of appeals applied the same reasoning in the companion cases of *Zweibon* v. *Mitchell*, No. 78-1348 (July 12, 1979), petition for cert. filed this date, and *Smith* v. *Nixon*, No. 78-1526 (July 12, 1979), petition for cert. filed this date, though the wiretaps in those cases were far shorter in duration (six and three months, respectively).

[24] The district court did not attribute such knowledge to petitioners Nixon and Kissinger. The court of appeals rejected their claims of qualified immunity nonetheless, holding that they must "establish their subjective good faith [at trial] as an affirmative defense" (App. A, *infra*, 40a).

> against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Because of these distinctions, the Court recognized that the reasonableness criteria of the Fourth Amendment for national security surveillance are necessarily different than those applicable to ordinary criminal investigations. *Id.* at 322-323. The Court refrained, however, from attempting to describe what the constitutional limits might be. *Id.* at 323. It is thus apparent that there was no "established law" in 1970 and 1971 to guide petitioners in the conduct of the surveillance challenged in this case.[25]

The court of appeals also suggested that petitioners are not entitled to a qualified immunity because the district court had concluded that the wiretap was continued in "bad faith" (App. A, *infra*, 41a). The court of appeals relied in this regard on *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975), which held that the qualified immunity of a school official would be lost if "he took the action with the malicious intention to cause a deprivation of constitutional rights

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[25] Prior to 1972, national security wiretaps averaged between 78 and 209 days in length. *United States* v. *United States District Court*, *supra*, 407 U.S. at 325 (Douglas, J., concurring).

or other injury * * *." The court apparently equated the possibility that the wiretap was continued in "bad faith" with a "malicious intention" to cause "a deprivation of constitutional rights or other injury." [26]

There are two problems with this aspect of the court of appeals' reasoning. First, the district court did *not* hold that petitioners acted in bad faith. The district court ruled instead that, although the continuation of the wiretap by petitioners Mitchell and Haldeman (see note 24, *supra*) violated the reasonableness requirement of the Fourth Amendment, their conduct was not reckless or done with "malicious disregard of [respondents'] rights" (App. B, *infra*, 56a).[27] Because there was no clearly established law to guide petitioners' conduct, and because they did not act with malicious intent, petitioners were entitled to a qualified immunity as a matter of law even under the standards of *Wood* v. *Strickland*. See *Baker*

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[26] It seems obvious, however, that petitioners could not have maliciously intended to deprive respondents of a constitutional right that, at least in 1970 and 1971, was not known to exist. See also page 27, *infra*.

[27] The district court thought that petitioners' claim of qualified immunity failed because their conduct violated "established law" (App. C, *infra*, 73a), not because of any claimed subjective malicious intent. The court did conclude, however, that petitioners had not made an affirmative showing of subjective good faith, stating that their conduct was in disregard of settled law and that the evidence reflected a "seemingly political motive" for the continued surveillance (*id.* at 74a).

v. *McCollan*, *supra*, slip op. 1-2; *Procunier* v. *Navarette*, *supra*, 434 U.S. at 562. Cf. *United States* v. *Peltier*, 422 U.S. 531, 541-542 (1975).

Moreover, the precise limits of the doctrine of qualified immunity are not the same for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 247. It is undisputed that the scope of discretion and breadth of responsibility entrusted to the President, and to the advisors who assist and act for him, differ markedly from those of federal officials generally. The same reasons that support the conclusion that these officials are absolutely immune for their official acts (pages 11-22, *supra*) also indicate that, if their immunity is only qualified, they should not be required to disprove allegations of "malice" in personal damages actions.

The court of appeals recognized that charges of malice can easily be made and that the necessity of a trial on such claims could seriously disrupt the President's conduct of office (App. A, *infra*, 47a). See page 17, *supra*. Because of the special functions performed by the President and the need to avoid undue interference with this responsibility in a scheme of separated powers, the President and officials acting for him should be entitled to qualified immunity as a matter of law where their conduct did not ignore or defy clearly established constitutional require-

ments. This application of the qualified immunity doctrine to the President and his close advisors would impose a judicial restraint on intentional misconduct without subjecting the President to the possibility of a lengthy and disruptive hearing on allegations of malice that would rarely be sustainable (see App. A, *infra*, 45a).

3. The court of appeals held that the principles established in *United States* v. *United States District Court*, *supra*, and *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)—both of which were decided after the wiretap in this case was discontinued—should apply retroactively to create a cause of action for damages as a result of the unconstitutional surveillance of an American citizen for national security purposes (App. A, *infra*, 29a-31a).[28] The court's decision in this regard con-

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[28] The court of appeals relied on the reasoning of *Zweibon* v. *Mitchell*, *supra*, which it decided on the same day. In its first decision in *Zweibon*, the court had concluded that the principles of *United States* v. *United States District Court* apply to domestic national security cases, unless the target of the surveillance is an agent of, or a collaborator with, a foreign power, 516 F.2d 594, 655 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*). We do not seek review of this aspect of the decision in *Zweibon I* because essentially the same result is now provided for by the Foreign Intelligence Surveillance Act of 1978. See note 1, *supra*. Indeed, under Section 104(a) of the Act, prior judicial authorization is now generally required even if the target of the surveillance is a foreign agent or collaborator. 92 Stat. 1788-1789. The President may, however, authorize such surveillance in limited circumstances without applying for a judicial order. Section 102(a) of the Act, 92 Stat. 1786-1787.

flicts with the decision of the Ninth Circuit in *Weinberg* v. *Mitchell*, 588 F.2d 275, 277-278 (1978), and is based on a misapplication of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

In *Chevron Oil*, the Court held that retroactive application of substantive rules announced in judicial decisions is inappropriate (1) if the decision established a new rule of law by deciding an issue of first impression in a way not "clearly foreshadowed" by earlier decisions, (2) if retroactive application of the rule would not further its purpose or (3) if retroactive application would impose hardship or produce inequitable results. Each of the factors identified in *Chevron Oil* argues against retroactive application of the principles established in *United States* v. *United States District Court* in a suit claiming personal damages liability.

First, the Court expressly noted that its decision in *United States District Court* involved questions of first impression (407 U.S. at 299),[29] and, in view of the fact that "[t]he use of such surveillance in internal security cases [had] been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946" (*id.* at 310), it cannot be said, and the Court did not suggest, that its decision

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[29] Indeed, the Court stated that the question being decided there was a "delicate" and "important one" and that that case brought "the issue here for the first time." 407 U.S. at 299.

was clearly foreshadowed. See *id.* at 299, 319-320.[30] Second, retroactive application of that decision would not further its purpose because "[t]he rule looks to a *future* free from [unreasonable] surveillance." *Weinberg* v. *Mitchell, supra,* 588 F.2d at 278 (emphasis added). See also *United States* v. *Peltier, supra,* 422 U.S. at 535. The deterrent purpose of the rule plainly is not served by its retroactive application to conduct wholly completed before its announcement. *Id.* at 538.[31] Third, because the law was not clearly established, retroactive application of the principles of *United States* v. *United States District Court* to establish personal damages liability would be inequitable. Indeed, as the Ninth Circuit stated in *Weinberg* v. *Mitchell, supra,* 588 F.2d at 278, it "would be as inequi-

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[30] In the context of criminal trials of defendants whose constitutional rights were violated, the Court has noted that "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application." *United States* v. *Peltier, supra,* 422 U.S. at 535.

[31] In *Morales* v. *Hamilton,* 391 F. Supp. 85 (D. Ariz. 1975), the district court rejected the claim that *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), should be applied retroactively to create a *Bivens* cause of action for damages against officers who conducted roving border patrol searches. The court concluded that retroactive creation of such a damages action would violate *ex post facto* principles and that *Almeida-Sanchez* should not be construed to give a "plaintiff a cause of action which he did not originally have." 391 F. Supp. at 88.

table as *ex post facto* criminal liability" and "would be nothing short of punitive." See *Morales* v. *Hamilton*, 391 F. Supp. 85, 88 (D. Ariz. 1975).

Moreover, in denying any significance to the district court decisions that had concluded prior to *United States* v. *United States District Court* that warrantless national security wiretaps, authorized by the President or the Attorney General, are valid (see *United States* v. *O'Neal*, Cr. No. KC CR 1204 (D. Kan. Dec. 1, 1970); *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970)),[32] the court of appeals failed to heed this Court's admonition in *United States* v. *Peltier*, *supra*, 422 U.S. at 542:

> [U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm.

By contrast, the Ninth Circuit correctly applied the factors announced in *Chevron Oil* in refusing to recognize a cause of action for a national security surveillance that preceded the decision in *United States* v. *United States District Court*. This Court should resolve the conflict.

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[32] See also *United States* v. *Butenko*, 494 F.2d 593 (3d Cir.), cert. denied, 419 U.S. 881 (1974); *United States* v. *Clay*, 430 F.2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2014

MORTON HALPERIN ET AL., APPELLANTS

v.

HENRY KISSINGER ET AL.

No. 77-2015

MORTON HALPERIN ET AL.

v.

HENRY KISSINGER ET AL.
RICHARD M. NIXON, JOHN N. MITCHELL,
AND H. R. HALDEMAN, APPELLANTS

Appeal and Cross-Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 1187-73)

Argued February 9, 1979

Decided July 12, 1979

Before WRIGHT, *Chief Judge*, ROBINSON, *Circuit Judge*, and GESELL,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Concurring opinion filed by *District Judge* GESELL.

WRIGHT, *Chief Judge*: Morton Halperin, a former member of the National Security Council (NSC) staff, and his family sued ten federal officials for money damages following revelations that their home telephone had been tapped by the Government from May 1969 until February 1971.[1] The Halperins alleged that the wiretap, which was installed during an investigation into public disclosures of confidential information,[2] was prohibited by both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[3] On cross-motions

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292 (a) (1976).

[1] The defendants were President Richard Nixon, former Attorney General John Mitchell, National Security Adviser Henry Kissinger, presidential aides H. R. Haldeman, John Ehrlichman, Alexander Haig and Jeb Magruder, FBI Director Clarence Kelley and FBI official William Sullivan, and Assistant Attorney General Robert Mardian. The suit also named the Chesapeake & Potomac Telephone Company (C&P) as a defendant, but plaintiffs do not appeal the District Court's judgment in favor of C&P. Joining Halperin in the complaint were his wife, Ina, and their three minor children.

[2] The investigation eventually included electronic surveillance of 13 Government employees and four newspaper reporters, including the appellant in a case we also decide today, *Smith* v. *Nixon*, —— F.2d —— (D.C. Cir. No. 78-1526, decided July 12, 1979).

[3] Pub. L. No. 90-351, 82 STAT. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976).

for summary judgment in December 1976 the District Court ruled in favor of all defendants except former President Richard M. Nixon, former Attorney General John N. Mitchell, and former presidential aide H. R. Haldeman.[4] The court concluded that Nixon, Mitchell, and Haldeman had violated the Halperins' Fourth Amendment rights, but not the terms of Title III. The Halperins were awarded $1 in nominal damages in August 1977.[5]

Plaintiffs and defendants Nixon, Mitchell, and Haldeman appeal the decision.[6] The Halperins insist that the District Court erred in not applying Title III, in awarding only nominal damages, and in granting summary judgment in favor of former National Security Advisor Henry Kissinger. The defendants claim absolute immunity from this action and dispute the District Court's refusal to bar the suit on qualified immunity grounds. We affirm the District Court's conclusions on the immunity question, but reverse on the applicability of Title III, the

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[4] *Halperin* v. *Kissinger*, 424 F.Supp. 838 (D. D.C. 1976).

[5] *Halperin* v. *Kissinger*, 434 F.Supp. 1193 (D. D.C. 1977). If the court had found Title III applicable, plaintiffs would have been entitled to $100 in liquidated damages for each day of illegal wiretapping, plus punitive damages and attorney fees. *See* 18 U.S.C. § 2520 (1976).

[6] Because both sides appeal the decision of the District Court, it is easier to identify the parties by their status in the trial court, in order to avoid confusion among appellants, cross-appellants, and the like. We refer to the Halperins as plaintiffs and Nixon, Mitchell, Haldeman, and Kissinger as defendants.

proper measure of damages, and defendant Kissinger's motion for summary judgment. In addition, we believe that the District Court should have applied the warrant requirement for national security wiretaps as articulated in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972), and *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

I. THE WIRETAP

Shortly after taking office in 1969 President Nixon and his top advisers grew concerned over press disclosures of classified information.[7] In their view such "leaks" limited the Administration's flexibility in developing foreign policy and could have eroded the candor of foreign governments in dealings with this country. On April 25, 1969 the President met in his office with Kissinger, Mitchell, and J. Edgar Hoover, the late Director of the Federal Bureau of Investigation (FBI), to discuss methods for controlling leaks. Mitchell, Hoover, and Nixon continued the discussion over dinner at Camp David that evening and developed a program, including wiretaps on private telephones, for investigation of suspected "leakers." [8] Both Mitchell and Hoover assured Nixon that the

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[7] In response to interrogatories Kissinger listed 20 newspaper articles between February 3 1969 and May 6, 1969 that in his opinion were based on leaked information. Joint Appendix (JA) 129-132.

[8] Nixon Deposition at 18-22, 25-26; Mitchell Deposition at 20-21.

President could order such wiretapping without first obtaining a court order.[9] Three criteria were established at the meeting for identifying individuals to be investigated: (1) access to sensitive data that was being revealed publicly; (2) information in security files that "raised questions" about an individual; and (3) other incriminating information in FBI files.[10]

Over the next two weeks the appearance of several newspaper stories seemingly based on classified reports heightened the Administration's alarm over leaks.[11] The surveillance program was finally triggered by a *New York Times* article on May 9 revealing massive American bombing of targets in Cambodia.[12] Nixon told Kissinger to ask the FBI to investigate the source for the story.[13] Although Halperin had no access to the information in the *Times* article,[14] FBI Director Hoover informed Kissinger

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[9] Mitchell Deposition at 76-79, 81-85; Nixon Deposition at 19-21.

[10] Nixon Deposition at 61; Kissinger Deposition at 28. On these facts the District Court concluded that President Nixon "authorized a program of electronic surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy of the United States." *Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 840.

[11] *See Chronology of Events Relative to the Seventeen Wiretaps and Pertinent Documents,* in *Dr. Kissinger's Role in Wiretapping: Hearings Before the Senate Foreign Relations Committee,* 93d Cong., 2d Sess. 22-23 (1974) (hereinafter cited as *Kissinger Hearings*).

[12] *Raids in Cambodia by U.S. Go Unprotested,* N.Y. Times, May 9, 1969, at 1, col. 3.

[13] Nixon Deposition at 23; Kissinger Deposition at 50.

[14] Halperin Affidavit (Nov. 12, 1973), JA 102.

that Halperin was the "prime suspect." [15] Hoover and Kissinger conferred by telephone four times that day,[16] and the wiretap on the Halperin home telephone was in place by evening.[17] Earlier that day, however, Kissinger had informed Halperin that he was considered a potential leaker, and the two men agreed that Halperin's access to classified information should be curtailed in order to allay suspicions.[18] Three other private telephones were wiretapped in the attempt to find the source of the May 9 article.[19]

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[15] Kissinger Deposition at 48-49. Hoover alleged that Halperin had been a roommate of the reporter who wrote the story. *Id.* Two other items in Halperin's files were deemed to raise questions about his reliability: (1) failure to report in a 1966 Department of Defense form that he had stopped in Greece, Yugoslavia, and the Soviet Union on a previous round-the-world journey; and (2) incorrect identification of a Russian national with whom he lunched in 1967. JA 241-244; *see Kissinger Hearings, supra* note 11, at 182 (testimony of H. Kissinger) (blanks in testimony filled in by answers to interrogatories at JA 133). Halperin attributed the first omission to clerical oversight and the second to his error. JA 219-221. An internal FBI memorandum from Hoover identified Halperin as agreeing to a 1965 proposal for a national sit-in on the Vietnam War, as having subscribed to a Marxist publication, and as being a "so-called arrogant harvard-type [*sic*] Kennedy" man. JA 49-50. For a discussion of Halperin's allegation that he was singled out for surveillance for political reasons, *see* text accompanying note 82-84 *infra*.

[16] *Chronology*, in *Kissinger Hearings, supra* note 11, at 23.

[17] *Id.* at 80 (testimony of J. Adams, Deputy Associate Director of FBI).

[18] Halperin Affidavit, *supra* note 14, JA 102-103; Kissinger Deposition at 58-59.

[19] Memorandum from W. C. Sullivan to C. D. DeLoach (May 11, 1969), JA 51.

The following day FBI officials and Colonel Alexander Haig, Kissinger's assistant, worked out procedures to conduct the surveillance "with no record maintained" in normal FBI files.[20] The Bureau then formally requested wiretap authorization from the Attorney General. With respect to Halperin, the FBI memorandum stated only:

> Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by the Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.[21]

Attorney General Mitchell approved the wiretap.[22]

The FBI agents conducting the surveillance compiled summaries of the overhead conversations, but neither preserved the tapes of the conversations nor attempted to minimize overhearing of personal discus-

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[20] *Id.*

[21] Memorandum from J. E. Hoover to Attorney General (May 12, 1969), JA 52.

[22] On May 6, 1969 Attorney General Mitchell had promulgated procedures to be followed in warrantless national security surveillance. Memorandum from the Attorney General to Director, FBI (May 6, 1969), JA 38-45. The procedures specified in that memo—including that a wiretap authorization request identify the target premises and estimate the period of surveillance—were not followed in the instant case. The Justice Department's policy of requiring renewals of wiretap authorizations every 90 days, *see* Mitchell Deposition at 9-10, was also ignored.

sions.[23] Despite observations by the FBI in May and June of 1969 that the Halperin tap was not producing evidence of a leak,[24] Kissinger requested that the taps be continued.[25] On July 8, 1969 the FBI recommended ending some of the electronic surveillance of suspected leakers, including Halperin.[26] On September 15 Kissinger requested termination of all wiretaps except Halperin's and one other.[27] Four days later Halperin resigned from the NSC staff, although at Kissinger's request he continued as a consultant to the Council.[28]

Halperin retained his consultant position until May 1970, but had no access to classified information during that period, and worked only one day for the NSC.[29] The wiretap remained in place. Nor was

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[23] Jones Deposition at 24-27.

[24] Memorandum from W. C. Sullivan to C. D. DeLoach (May 15, 1969), JA 54; Memorandum from W. C. Sullivan to C. D. DeLoach (June 20, 1969), JA 58.

[25] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55 ("Dr. Kissinger said he wanted the coverage to continue for a while longer"); Memorandum from A. Haig to H. A. Kissinger (June 4, 1969), JA 57 (series of "Talking Points" for meeting with Hoover: recommending continuing Halperin tap "so that a pattern of innocence can be firmly established").

[26] Letter from W. C. Sullivan to J. E. Hoover (July 8, 1969), JA 59 ("Halperin has said almost nothing on the telephone. My guess is that he assumes it is tapped.").

[27] Memorandum from W. C. Sullivan to C. D. DeLoach (Sept. 15, 1969), JA 60.

[28] Halperin Affidavit, *supra* note 14, JA 104.

[29] *Id.* *See* JA 161 (Kissinger's answers to interrogatories).

there any reduction in surveillance when he resigned from his consultant position in protest over the American invasion of Cambodia in May 1970. After that resignation, however, the FBI reports on the wiretap were no longer sent to the National Security Adviser, but went to Haldeman, the President's chief administrative aide.[30] In July 1970 the FBI agent in charge of the wiretap suggested to his superior that the surveillance be lifted,[31] but it continued until February 10, 1971.[32]

Plaintiffs cite FBI logs showing that agents overheard more than 600 calls on the Halperin telephone, of which only 28 percent were between Halperin and people outside the family.[33] The summary letters

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[30] Memorandum from C. D. DeLoach to W. C. Sullivan (May 13, 1970), JA 75; Haldeman Deposition at 52-54.

[31] Note to W. C. Sullivan, JA 78 ("I haven't noticed much info of value in recent months from coverage—suggest consider discontinuing").

[32] The taps were removed at the instigation of the FBI, Memorandum from W. C. Sullivan to C. Tolson (Feb. 10, 1971), JA 81; Memorandum from J. E. Hoover to Attorney General (Feb. 11, 1971), JA 83, which had recently been criticized for its wiretapping practices. *Chronology*, in *Kissinger Hearings, supra* note 11, at 29 (citing Feb. 7, 1971 newspaper article criticizing FBI wiretapping). Director Hoover was scheduled to testify before Congress shortly thereafter. *See* S. Rep. No. 94-755, Book III, 94th Cong., 2d Sess. 326 (1976).

[33] Plaintiffs-appellants' brief at 11-12. The FBI logs, which are not complete JA 115, show that 638 calls on the Halperin phone were recorded in whole or in part. Morton Halperin was party to 355 (55%) of the recorded calls on 253 separate dates, but 173 calls (27% of the total) were between him and

from the FBI contain much political information, covering such topics as planned publications criticizing the nation's Vietnam policy,[34] congressional lobbying on war-related legislation,[35] and political campaign plans, including potential opposition to President Nixon in 1972.[36] There is some evidence that the political information was valued at the White House. Disclosure in one of the Halperin summary

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his wife. Two hundred and seventy-seven (43%) of the calls were between Ina Halperin and persons not involved in this suit. Their three minor children were each overheard in at least one conversation in which they were identified, and 13 other log entries refer to unidentified children.

[34] Letter from J. E. Hoover to H. R. Haldeman (Oct. 14, 1970), addendum to plaintiffs-appellants' brief at 3 ("Halperin said he was writing a paper on the President's speech which he intended to give Max Frankel of the 'New York Times' to use as he desired. He also said that he was writing a newspaper article on Vietnam.").

[35] Letter from J. E. Hoover to H. R. Haldeman (May 26, 1970), *id.* at 2 (discussion of McGovern-Hatfield Amendment to cut off military funds); Letter from J. E. Hoover to H. R. Haldeman (June 23, 1970), *id.* at 3 (Halperin "agreed to talk to the 'top people' in the offices of Senators Norris Cotton and James B. Pearson on the war in Cambodia. [ ] described Senator Cotton as 'marginal' on the Church-Cooper amendment but said that Halperin's talk could make Senator Pearson favor the amendment.").

[36] Letter from J. E. Hoover to H. R. Haldeman (Nov. 13, 1970), *id.* at 4 ("Halperin and [ ] also discussed a meeting which may take place this week to advise Senator Muskie concerning 'China policy.'"); Letter from J. E. Hoover to H. R. Haldeman (Dec. 17, 1970), *id.* (discussed "forthcoming trip by Senator Edmund Muskie to Russia and said Muskie was making the trip recommended by Clifford * * *. He also mentioned that Averell Harriman was going with Muskie.").

letters that a former cabinet officer planned a magazine article opposing the Nixon Administration's foreign policy served as the basis for a planned "counterattack" to the anticipated article.[37] The FBI summaries revealed no evidence suggesting that Halperin was leaking classified data.[38]

The records of the Halperin wiretap were minimal. At first the FBI logs were kept at the Bureau in special files, where Kissinger and Haig reviewed them.[39] Subsequently summary letters were sent to Kissinger, Nixon (through presidential counsel John Ehrlichman), and occasionally Mitchell.[40] As noted above,

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[37] An FBI letter to Kissinger on December 29, 1969 said that Halperin had discussed a proposed article in *Life Magazine* by Clark Clifford, former Secretary of Defense, on Vietnam. JA 64. The letter identified foreign policy statements by Nixon that Clifford intended to attack (*e.g.*, that President Thieu of South Vietnam "is one of the five greatest men of our time"; that "Vietnam is one of the finest hours in United States history"). The White House staff researched the alleged quotations, *see* Memorandum from Jim Keogh to Jeb Magruder (Jan. 12, 1970), JA 69, and Ehrlichman wrote to Haldeman, "This is the kind of early warning we need more of—your game planners are now in an excellent position to map anticipatory action." J.A. 70. The Clifford article never appeared.

[38] Part of the relief granted in the District Court was an order that Halperin's security file be amended to include "a statement by Dr. Kissinger that the wiretap produced no information impugning either Dr. Halperin's loyalty or his discretion." *Halperin* v. *Kissinger, supra* note 5, 434 F.Supp. at 1196.

[39] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55.

[40] *Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 841.

after May 1970 only Haldeman received the letters. When the surveillance was terminated the records were stored in a White House safe. The wiretap program first came to public attention in the 1973 espionage trial of Dr. Daniel Ellsberg, when the Government admitted that Ellsberg had been overheard by the FBI on Halperin's home telephone.[41] This suit was filed in June 1973, within a month of that disclosure.

II. Individual Rights and National Security

This case presents the conflict between the Government's need to act decisively to safeguard the nation's security and those individual rights that are implicated in any surveillance situation.[42] In such a case we must carefully consider any impact that our decision might have on the nation's ability to defend itself and its vital interests. Equally, as the Supreme Court has said, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties * * * which makes the defense of the Nation worthwhile." [43] Because of the significance of the competing interests at stake,

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[41] *United States* v. *Russo and Ellsberg*, No. 9373 (C.D. Cal., Order of May 11, 1973). The Ellsberg prosecution, which followed public disclosure of the Pentagon Papers, was dismissed when the Government refused to produce the Halperin wiretap records.

[42] *See United States* v. *United States District Court (Keith)*, 407 U.S. 297, 313 (1972).

[43] *United States* v. *Robel*, 389 U.S. 258, 264 (1967).

we wish to consider their relationship before addressing the particular claims here.

Plaintiffs assert two intertwined constellations of personal rights: those revolving around privacy interests and those growing out of the First Amendment's guarantees of freedom of speech, press, association, and belief. The damage to privacy caused by Fourth Amendment violations was captured by Justice Brandeis' dissent in *Olmstead* v. *United States:* [44]

> [The Framers of the Constitution] conferred, as against the Government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. * * *

The First Amendment buttresses the individual's protection against indiscriminate or unreasonable wiretapping. Such surveillance invades the citizen's constitutionally protected right to free private discussion,[45] and must inevitably chill public speech. Either result is intolerable.

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[44] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[45] *See Givhan* v. *Western Line Consolidated School District,* —— U.S. ——, ——, 47 L. WEEK 4102, 4104 (Jan. 9, 1979) (First Amendment rights not lost because communication is private rather than public).

In recent years both the Supreme Court[46] and Congress[47] have recognized the substantial injury to personal rights caused by unreasonable electronic surveillance. Although the technology of investigation has developed dramatically in the last century, the dangers of unwarranted governmental intrusion into citizens' private lives have not changed since Justice Bradley wrote in *Boyd* v. *United States*:[48]

> It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *. * * *

Without vigilant protection of a private space in which each citizen is free to pursue his own ideas and aspirations, we would betray our vision of a society based on the dignity of the individual.

The question presented by this case is when may these constitutional rights be overborne by the Executive to protect the security of the entire nation. Unfortunately, the inherent vagueness of the term

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[46] *See Berger* v. *New York*, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."); *Katz* v. *United States*, 389 U.S. 347 (1967); *Keith, supra* note 42.

[47] *See* 18 U.S.C. §§ 2511-2520 (1976) (Title III); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 STAT. 1783.

[48] 116 U.S. 616, 630 (1886).

"national security" hampers careful analysis.[49] All would agree that the term includes situations where the very existence of the Government is in jeopardy, but consensus may break down beyond such clear instances.

The Supreme Court has taken an extremely narrow view of the circumstances in which the Executive may exercise extraordinary powers under the Constitution. In *Mitchell* v. *Harmony*[50] the Court restricted the military's power to convert to its own use private property in a theatre of war.

> [T]he danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for * * *. * * * [51]

This attitude was echoed in decisions striking down martial law in Indiana in 1864[52] and in Hawaii in 1943.[53] In both cases the Supreme Court ruled that

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[49] *See Keith, supra* note 42, 407 U.S. at 314 ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' "); *id.* at 320 ("inherent vagueness of the domestic security concept"); *Zweibon* v. *Mitchell (Zweibon I)*, 516 F.2d 594, 653-654 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

[50] 54 U.S. (13 How.) 115 (1851).

[51] *Id.* at 134.

[52] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[53] *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946).

normal judicial processes may be superseded only when "foreign invasion" or "civil war" physically close the courthouses.[54] Similarly, in *Youngstown Sheet & Tube Co.* v. *Sawyer*[55] the Court found no basis in the Constitution for the President's seizure of steel mills during a wartime labor dispute, despite the President's claim that the war effort would be crippled if the mills were shut down.[56] Justice Jackson observed on that occasion that, because the drafters of the Constitution "suspected that emergency powers would tend to kindle emergencies," they "made no express provision for exercise of extraordinary authority because of a crisis."[57]

The Supreme Court's steadfast refusal to expand its view of emergency powers reflects an appreciation of the consequences of any national security exception to the usual constitutional limits on Executive conduct. The Court has not denied the reality of dangers from foreign or internal conflicts. Rather, it has recognized the need to respect constitutional requirements even in troubled times. Security inter-

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[54] *Id.* at 326 (Murphy, J., concurring); *Ex parte Milligan, supra* note 52, 71 U.S. (4 Wall.) at 127.

[55] 343 U.S. 579 (1952).

[56] *Id.* at 587 (Black, J.) ("It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution.").

[57] *Id.* at 650 (Jackson, J., concurring). *See also New York Times Co.* v. *United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring); *Zweibon I, supra* note 49, 516 F.2d at 635 n.107.

ests may be affected by fluctuations in international trade and the supply of natural resources, by social unrest at home and abroad, and by public disclosure of policy deliberations. But such events cannot routinely justify invasions of privacy or restrictions on expression without devaluing and eventually destroying those rights.

We believe, therefore, that whatever special powers the Executive may hold in national security situations must be limited to instances of immediate and grave peril to the nation. Absent such exigent circumstances, there can be no appeal to powers beyond those enumerated in the Constitution or provided by law.[58] Any security from one danger purchased with our individual rights would be but an illusion, for its price would be those protections against all other threats to our liberty.

III. Title III and the Fourth Amendment

Standards for evaluating the legality of this electronic surveillance derive from the Constitution and from Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[59] The Government has con-

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[58] *See Zweibon I, supra* note 49, 516 F.2d at 649-650; 18 U.S.C. § 2518(7) (1976). *See also Ex parte Milligan, supra* note 52, 71 U.S. (4 Wall.) at 120-121.

[59] We are not concerned over the justiciability of this case. Although the Constitution exclusively commits the resolution of some questions to the Executive or Legislative Branches, here we are called on to determine whether electronic surveillance was consonant with statutory and constitutional strictures, a traditional judicial function that is governed by well

ceded that the Fourth Amendment's ban on *unreasonable* searches and seizures applied to national security wiretaps in 1969,[60] but disputes the application of the Amendment's judicial warrant requirement.[61] The

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established and manageable standards. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 73 (1978). Decision of these appeals requires no initial policy decisions on how best to deal with the problem of Government leaks; nor need it entail any embarrassment to the Executive. Our course is reinforced by the Supreme Court's decision in *Keith, supra* note 42, which involved "the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval." 407 U.S. at 299. There the Court proceeded immediately to resolution of the merits, rejected the contention that national security wiretaps involve factors "beyond the competence of courts to evaluate," *id.* at 319; *see Zweibon I, supra* note 49, at 641-647, and declined to carve out a national security exception to the warrant requirement of the Fourth Amendment.

Our duty to decide this case is not diminished because we deal with the President's foreign affairs power. The Supreme Court explicitly stated in *Baker* v. *Carr*, 369 U.S. 186, 211 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *See United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (the foreign affairs power "must be exercised in subordination to the applicable provisions of the Constitution"). Of course, the Executive's determination that national security was threatened in a particular situation is entitled to deference, *see United States* v. *Nixon*, 418 U.S. 683, 711-712 (1974), but "[E]xecutive action is not proof of its own necessity." *Duncan* v. *Kahanamoku, supra* note 53, 327 U.S. at 336 (Stone, C.J., concurring).

[60] Indeed, that was the Government's argument to this court in *Zweibon I, supra* note 49, 516 F.2d at 628.

[61] *Keith, supra* note 42, 407 U.S. at 314-321; *Zweibon I, supra* note 49, 516 F.2d at 613-614. *Keith* involved a "domestic security" threat posed by an American citizen suspected of

Keith Court observed that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause," [62] but warrantless searches have been approved in "certain carefully defined classes of cases." [63] Thus we must acknowledge that the Fourth Amendment's warrant requirement may not always apply, while a reasonableness standard may vary in different situations.[64] In contrast, Title III bans most electronic surveillance and specifies procedures for wiretapping and eavesdropping in particular situations; but the statute expressly does not limit the President's constitutional

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planning disruptive actions, such as bombing, while *Zweibon I* concerned a "foreign security" danger resulting from anti-Soviet activities by the Jewish Defense League that might provoke Russian retaliation. *Keith* was a unanimous ruling, and six of the eight judges participating in *Zweibon I* agreed that the Fourth Amendment warrant requirement applied to that surveillance. The other two judges in *Zweibon I* would not have reached the Fourth Amendment issue in that case.

[62] *Keith, supra* note 42, 407 U.S. at 315.

[63] *Camara* v. *Municipal Court,* 387 U.S. 523, 528 (1967). *See, e.g., Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970) (search of federally regulated liquor dealer); *Chimel* v. *California,* 395 U.S. 752, 763 (1969) (arresting officers may search area "within [the] immediate control" of suspect); *Terry* v. *Ohio,* 392 U.S. 1, 20 (1968) (incipient crime).

[64] *See Scott* v. *United States,* 436 U.S. 128, 139 (1978) ("Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case."); *Keith, supra* note 42, 407 U.S. at 314 ("the Fourth Amendment is not absolute in its terms").

power to wiretap in national security situations.[65] Although the mandate of the statute is more precise, the reach of the constitutional provision may be seen as greater.[66]

To gauge the propriety of the Halperin surveillance under the overlapping constitutional and statutory standards, we must review the circumstances of the wiretapping and its connection to reasonable national security concerns.[67] If that connection is re-

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[65] The plurality opinion in *Zweibon I*, *supra* note 49, 516 F.2d at 659-670, concluded that although Title III did not affect presidential wiretapping *powers* in national security situations, some of the procedural and remedial provisions of the statute were relevant to constitutional surveillances in such instances. But our decision today in *Zweibon* v. *Mitchell* (*Zweibon III*), —— F.2d ——, —— (D.C. Cir. No. 78-1348, decided July 12, 1979) (slip op. text at notes 52-60), restricts that particular conclusion to prospective effect. Since this case involves events from 1969 until 1971, only the constitutional procedures and remedies are relevant here.

[66] Last year Congress enacted additional legislation, explicitly covering national security surveillance involving foreign policy problems, Foreign Intelligence Surveillance Act of 1978, *supra* note 47, and repealing § 2511(3) of Title III, the pivotal statutory provision in this case. The 1978 statute does not control this case, however. That law expressly does not apply to surveillances that are terminated no more than 90 days after the Chief Justice designates the first judge to sit on a special court to review warrant applications under the new law. Foreign Intelligence Surveillance Act of 1978, 92 STAT. 1798, § 301.

[67] That this relationship may be somewhat distant was conceded by defendant Kissinger in testimony before the Senate Foreign Relations Committee:

> [W]hen one is new in Government, leaks take on an extraordinary significance, because one has a sort of a

mote, or the supposed national security concerns ephemeral, we must remand to the District Court for a determination whether Title III should be applied; where the professed national security issues appear valid, we must still insist on compliance with the Fourth Amendment. We will first consider the applicability of Title III and then examine the requirements of the Fourth Amendment.

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Title III was designed to limit Government use of electronic surveillance techniques. According to the Supreme Court, the statute and legislative history "evince[] the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." [68] This court has observed that "[t]he Act's

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tendency to think that a top secret paper is inviolate * * *.
* * *

One has to be candid. This is sometimes out of proportion to the intrinsic damage that this particular leak may do, looked at in the long view. * * *

Kissinger Hearings, supra note 11, at 323.

[68] *United States* v. *Giordano*, 416 U.S. 505, 515 (1974). *See Alderman* v. *United States*, 394 U.S. 165, 175 (1969) ("The general rule under [Title III] is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant."); *United States* v. *Jones*, 542 F.2d 661, 671 (6th Cir. 1976) ("the pervasive theme of Title III [is] that electronic surveillance should be sharply curtailed and in no instance be undertaken without strict judicial authorization and supervision"); S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968).

essential purpose * * * was to combine a limited and carefully articulated grant of power to intercept communications with an elaborate set of safeguards to deter abuse and to expunge its effects in the event that it should occur." [69]

The statute is straightforward. Section 2511 bans all electronic surveillance not authorized by Title III, with three exceptions not relevant to this case.[70] Surveillance is permitted for investigation of "classes of crimes carefully specified in 18 U.S.C. § 2516," [71] so long as stringent procedural requirements are satisfied.[72] The statute provides for civil as well as

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[69] *In re Evans*, 452 F.2d 1239, 1243 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972).

[70] Those exceptions involve wiretapping by communications common carriers for billing and maintenance purposes, 18 U.S.C. § 2511(2)(a)(i) (1976), by the Federal Communications Commission in its regulatory capacity, *id.* § 2511(2)(b), and by prior consent of a party, *id.* § 2511(2)(c).

[71] *Keith, supra* note 42, 407 U.S. at 301-302. Among the crimes for which surveillance under Title III may be authorized are espionage, sabotage, treason, labor racketeering, murder, kidnapping, robbery, extortion, bribery of public officials, obstruction of justice, gambling, and drug trafficking. 18 U.S.C. § 2516 (1976).

[72] The warrant application must include "a full and complete statement of the facts and circumstances" showing the need for the wiretap or eavesdropping, 18 U.S.C. § 2518(1)(b) (1976), an explanation of why other investigative procedures either have not been successful or are not appropriate, *id.* § 2518(1)(c) and an estimate of the period of surveillance, *id.* § 2518(1)(d). Government agents must minimize the intrusiveness of the surveillance and no warrant can extend for longer than 30 days. *Id.* § 2518(5). Finally, after

criminal prosecution of violators, with minimum civil damages set at $100 for each day of violation, plus punitive damages and attorney's fees.[73] A good faith defense is available to Government officials sued under Title III, as we discuss in detail in Part IV of this opinion.

The applicability of Title III to the Halperin wiretap hinges on Section 2511(3), which enumerates five national security situations in which surveillance would not be covered by the statute. This provision, as the *Keith* Court held, is an "expression of congressional neutrality" on national security surveillances:

> [N]othing in § 2511(3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security. * * * [74]

Hence, if a surveillance falls under Section 2511(3), it is still subject to constitutional limitations, but not to Title III's requirements and prohibitions.

Only one of the five circumstances listed in Section 2511(3) might apply to this case: That nothing in Title III "shall limit the constitutional power of the President * * * to protect national security informa-

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the wiretapping or eavesdropping is terminated, all identifiable persons whose communications have been intercepted must be notified of the surveillance unless the investigators show good cause not to do so. *Id.* § 2518(8)(d).

[73] *Id.* § 2520.

[74] *Keith*, *supra* note 42, 407 U.S. at 308 (emphasis in original).

tion against foreign intelligence activities."[75] We face an initial problem in applying this provision to the instant case, since there was never any allegation that the Halperins were directly connected to "foreign intelligence activities." Although it is surely possible for vital secrets to be revealed through a leak to the press, both courts and Congress have looked for a direct link between the wiretap target and a foreign interest as a justification for surveillance.[76] In the absence of such a connection, we must

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[75] The other four circumstances are protection against "actual or potential attack or other hostile acts of a foreign power," obtaining "foreign intelligence information deemed essential to the security of the United States," and protection against either "overthrow of the Government by force or other unlawful means," or any other clear and present danger to the structure or existence of the Government." 18 U.S.C. § 2511(3) (1976).

[76] *See, e.g., Keith, supra note* 42, 407 U.S. at 309 ("There is no evidence of any involvement, directly or indirectly, of a foreign power."); *Zweibon I, supra* note 49, 516 F.2d at 655 (no Executive power for warrantless wiretapping "at least where the subject of the surveillance is a domestic organization that is not the agent of or acting in collaboration with a foreign power"); S. Rep. No. 1097, *supra* note 68, at 94 (discussing § 2511(3) in context of foreign security threats; cites members of Communist Party of the United States as "instruments of the foreign policy of a foreign power" and notes problem of "agents of foreign powers and those who cooperate with them"). The Foreign Intelligence Surveillance Act of 1978, *supra* note 47, specifies procedures for wiretapping and eavesdropping of "agents of a foreign power" and participants in terrorist acts. *Id.* § 101(b) & (c). The following striking passage appears in the House report on that legislation:

> It should be clear from the foregoing, but for the sake of explicitness the committee wishes to make perfectly

closely scrutinize the validity of the national security rationale.[77]

The District Court declined to apply Title III because of "the indisputable difficulties and ambiguities presented by § 2511(3)."

> In view of the confused state of the law and the 30-year history of similar [warrantless national security wiretaps] * * *, the Court finds that defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance. * * * [78]

This statement conflates the standards for a good faith defense with the applicability of Title III,[79] and reflects a fundamental misapprehension of the Hal-

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clear, that *surveillance would not be authorized under this*, or any other definition of agent of a foreign power *against an American reporter merely because he gathers information for publication in a newspaper, even if the information was classified by the Government. Nor would it be authorized against a Government employee or former employee who reveals secrets to a reporter or in a book for the purpose of informing the American people.* * * *

H.R. Rep. No. 95-1283, Part I, 95th Cong., 2d Sess. 40 (1978) (emphasis added).

[77] In view of the well-documented practice of classifying as confidential much relatively innocuous or noncritical information, *see* H.R. Rep. No. 93-221, 93d Cong., 1st Sess. 100 (1973), we cannot conclude automatically that revelation of all "top secret" documents will endanger national security. *See* note 67 *supra; see also New York Times Co.* v. *United States*, *supra* note 57, 403 U.S. at 719 (Black, J.).

[78] *Halperin* v. *Kissinger*, *supra* note 4, 424 F.Supp. at 842.

[79] For discussion of good faith defense and absolute immunity issues, *see* Part IV *infra*.

perins' position. They argue that the wiretap was not related to national security, and thus was subject to the substantive and procedural terms of Title III. If they are correct in their first contention, the second is incontestable. The "30-year history" of warrantless national security wiretaps could not affect the applicability of Title III to nonnational security surveillances. Consequently, the proper inquiry for the District Court was whether the surveillance challenged here was a valid national security action.[80] To the extent that it was not, any uncertainty about the meaning of Section 2511(3) at the time of the wiretapping would be relevant only to the question of the defendants' official immunity to suit. As a result, we must reverse the grant of summary judgment on the statutory claim and remand for a determination by the District Court of whether the surveillance was reasonably intended to guard national security data from foreign intelligence agencies.

In this framework we see little evidence before us for classifying the surveillance from May 1970 to February 1971 as a national security action not reached by Title III. During those nine months Halperin had no official connection with the Government, and, in fact, had lacked access to much classified information for the preceding year;[81] a continuous,

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[80] *See Burkhurt* v. *Saxbe*, 397 F.Supp. 499, 504 (E.D. Pa. 1975).

[81] The Government argues that since much of the information Halperin had access to in his previous jobs remained classified after he left the Government, he was still a potential

year-long wiretap had revealed no evidence that he was a leaker; and the reports on the wiretap were not sent to Kissinger, the President's National Security Adviser, but to Haldeman, a political and administrative adviser. Moreover, since Halperin had almost no official contact with the National Security Council from September 1969 to May 1970, the national security basis for surveillance during those nine months would seem almost equally attenuated. Finally, plaintiffs have raised questions about the purported national security nexus even at the beginning of the wiretap. Halperin claims that the surveillance was initiated for political reasons stemming from his connection to previous administrations.[82] He points to letters from Senator Goldwater to President Nixon and to Attorney General Mitchell recommend-

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leaker. Passing by the problem of overclassification of documents, *see* note 77 *supra*, we think this argument proves too much. It would justify surveillance of thousands of former federal employees without any further indication of security threat.

[82] *See* note 15 *supra*. The second impeachment article approved by the House Judiciary Committee charged President Nixon with abusing the rights of private citizens by authorizing "Electronic Surveillance or Other Investigations for Purposes Unrelated to National Security, the Enforcement of Laws, or Any Other Lawful Function of His Office." H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146 (1974). The Committee added in explanation that Nixon "falsely used a national security pretext to attempt to justify" improper surveillances. *Id.* The Committee also squarely concluded that the May 1969 wiretaps, including Halperin's, were established for "political purposes." *Id.* at 35.

ing his ouster,[83] as well as to Kissinger's apparent request on June 4, 1969 that the surveillance be continued to establish "a pattern of innocence." [84] These events suggest, Halperin argues, that he was initially targeted for surveillance in order to bolster within the Nixon Administration the political credibility of Kissinger's staff appointments.

On remand the District Court must address all of these contentions. Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities. Where the parties have posed genuine issues of material fact, the court will have to undertake an evidentiary inquiry. Summary proceedings should be limited to those instances where the record before the court indicates no such issue.[85]

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[83] JA 35-37.

[84] Memorandum from A. Haig to H. Kissinger (June 4, 1969), JA 57.

[85] Rule 56 of the Federal Rules of Civil Procedure directs that a motion for summary judgment must be granted if the materials submitted to the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Mazaleski* v. *Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977); *Askew* v. *Bloemker*, 548 F.2d 673, 679 (7th Cir. 1976). *See also* text at notes 113-118 *infra*.

In view of the extensive discovery that has taken place in this case, the District Court may well be able to resolve remanded questions without reopening the record. It remains in the court's discretion, naturally, to receive additional submissions as necessary.

B

Throughout the 21 months of the Halperin wiretap the defendants in this case were under an obligation to comply with both the reasonableness and the warrant requirements of the Fourth Amendment. The District Court found that at some point during the surveillance the wiretap

> developed into a dragnet which lacked temporal and spatial limitation. It represent[ed] the antithesis of the "particular, precise, and discriminate" procedures required by the Supreme Court in numerous Fourth Amendment cases. * * * [86]

Although we agree that the surveillance did not satisfy the reasonableness standard, we must remand for consideration both of the warrant question and of *when* the wiretap became unreasonable. In addition, we cannot affirm the award of $1 nominal damages for the constitutional violations established here.

1. When the Supreme Court first applied the warrant provision of the Fourth Amendment to wiretapping in 1967, it expressly reserved the question of prior judicial approval of national security surveillances.[87] In *Keith*, however, the Court found that a

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[86] *Halperin* v. *Kissinger*, *supra* note 4, 424 F.Supp. at 843 (*citing Osborn* v. *United States*, 385 U.S. 323, 329-330 (1966); *Berger* v. *New York*, *supra* note 46, 388 U.S. at 55-60; *Katz* v. *United States*, *supra* note 46, 389 U.S. at 354-357)).

[87] *Katz* v. *United States*, *supra* note 46, 389 U.S. at 358 n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

warrant was necessary before a domestic target deemed a threat to national security could be wiretapped, and in *Zweibon I* this court ruled that a warrant was needed to wiretap a domestic group that may be concerned with foreign affairs but "that is not the agent of or acting in collaboration with a foreign power * * *." [88] At the root of these decisions was the conviction that prior judicial approval of wiretapping for national security matters, absent exigent circumstances, falls within the competence of the judiciary,[89] poses no additional threat to national security,[90] and provides a valuable check on Executive discretion.[91]

For the reasons articulated in our opinion today in *Zweibon* v. *Mitchell* (*Zweibon III*),[92] we conclude that a warrant was required for the Halperin wiretap in May 1969. The reasoning of both *Keith* and *Zweibon I*, which dealt with wiretaps initiated during the same period, applies with equal force to this situation, and there is no basis for limiting those cases to prospective effect. The District Court in the instant case "[a]ssum[ed] *arguendo*" that defendants were

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[88] *Zweibon I, supra* note 49, 516 F.2d at 655.

[89] *Keith, supra* note 42, 407 U.S. at 320; *Zweibon I, supra* note 49, 516 F.2d at 641-647.

[90] *Keith, supra* note 42, 407 U.S. at 320-321; *Zweibon I, supra* note 49, 516 F.2d at 647-648.

[91] *Keith, supra* note 42, 407 U.S. at 316-317; *Zweibon I, supra* note 49, 516 F.2d at 633-636.

[92] —— F.2d —— (D.C. Cir. No. 78-1348, decided July 12, 1979).

not subject to the warrant requirement, although it is not clear from that opinion whether the assumption was based on retroactivity considerations or defendants' possible immunity from suit.[93] In any event, such an assumption for purposes of argument is no substitute for a specific holding by the District Court. Of course, the defendants may be able to make out an immunity defense by arguing that due to uncertainty in the law on the warrant requirement there were reasonable grounds in 1969 for their failure to acquire a warrant, and that they did not act in bad faith.[94] This is a distinct question, however, from whether the Fourth Amendment mandated a warrant.

2. As we discussed above, we believe that Title III most likely should apply to at least part of the period of the Halperin surveillance. Nevertheless, for any period during which the District Court concludes that the surveillance was genuinely based on national security concerns, the wiretap might still have violated the Fourth Amendment's reasonableness standard.[95] The duration or conduct of the surveillance might well be deemed to have been unreasonable in view of the likely product of the wiretap, especially after the initial period. In that event, the trial court

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[93] *See Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 842-843.

[94] *See* Part IV *infra.*

[95] The constitutional remedy would be relevant only if the more specific procedures and remedies of Title III were not applicable. Of course, the constitutional and statutory remedies could not be granted simultaneously.

would have to establish the time span of that constitutional violation in order to determine damages.[96]

3. Damage suits for the vindication of individual rights date from the eighteenth century in England,[97] and have been widely recognized in our courts.[98] The Supreme Court stated in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, "[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[99] The instant suit is squarely within this tradition, and the Halperins are "entitled to recover money damages for any injuries [they have] suffered as a result of the * * * violation of the [Fourth] Amendment."[100]

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[96] Although the plurality in *Zweibon I*, *supra* note 49, found that some of the procedures and the civil damages provision of Title III should apply to unconstitutional wiretaps in national security situations, our ruling in *Zweibon III*, *supra* note 65, restricts that position to prospective effect. As a result, the District Court in this case will have to consider compensatory damages for any unconstitutional surveillance. *See also* note 106 *infra*.

[97] *See Entick* v. *Carrington*, 95 Eng. Rep. 807, 19 How. St. Tr. 1030 (1765) (unlawful search by King's officers); *Wilkes* v. *Wood*, 98 Eng. Rep. 489, 19 How. St. Tr. 1075 (1763) (same).

[98] *See, e.g., Nixon* v. *Condon*, 286 U.S. 73 (1932) (recognizing damage remedy in civil suit alleging wrongful denial of right to vote); *Wayne* v. *Venable*, 260 F. 64 (8th Cir. 1919) (same).

[99] 403 U.S. 388, 395 (1971). In Justice Harlan's pithy phrase, "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

[100] *Id.* at 397. In *Carey* v. *Piphus*, 435 U.S. 247 (1978), the Supreme Court ruled that in the absence of proof of injury

Even if a constitutional violation inflicts only intangible injury, compensation is still appropriate. In *Paton* v. *LaPrade* the Third Circuit enumerated many of the intangible injuries that might have been suffered by a student unreasonably investigated by the FBI: "stigmatization, invasion of privacy, interference with personality development, and interference with her freedom of association through the decision of others to shun her." [101] This approach has been followed by other circuits in suits alleging con-

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plaintiffs alleging violation of procedural due process rights may win only nominal damages. We think that holding does not require a similar award to the Halperins for two reasons. First, the Court emphasized that the "prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 264-265. The due process issue in *Piphus* concerned a student's right to a pre-suspension hearing, so it would indeed have been difficult to estimate the plaintiff's injury unless he could have shown that he would not have been suspended if a hearing had been held. The substantive rights asserted by the Halperins are of a much different character, as is evident from the traditional damage remedy for unlawful search marked by the English cases of *Entick* and *Wilkes*, *supra* note 97, and our *Bivens* doctrine. *See Carey* v. *Piphus*, *supra*, 435 U.S. at 264-265 (distinguishing cases involving "denial of Fourth Amendment rights"). Second, the Supreme Court ruled that the plaintiff in *Piphus* might still prove actual injury but simply could not claim a presumption of injury. *Id.* at 262-264. To the extent that the plaintiffs here can establish actual though intangible injury, damages would clearly be appropriate even under *Piphus*.

[101] 524 F.2d 862, 871 (3d Cir. 1975). Because it involved First Amendment and privacy rights, *id.* at 869-870, *Paton* is not limited by the Supreme Court's *Piphus* ruling. *See* note 100 *supra*.

stitutional violations by state officials under 28 [*sic*] U.S.C. § 1983 (1976).[102]

Due to the plaintiffs' reliance on a "presumption" of injury in requesting a damage award, the District Court concluded that there was "no demonstrable injury."[103] We think that conclusion neglected the possibility that plaintiffs might show loss due to emotional distress and mental anguish, traditional bases for tort recovery. Such harm might be demonstrated through direct testimony of the plaintiffs or might be "inferred from the circumstances,"[104] and if established would surely entitle the Halperins to more than nominal recovery. This court has held that in cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *."[105] Specify-

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[102] *See, e.g., Seaton* v. *Sky Realty Co.*, 491 F.2d 634, 636-638 (7th Cir. 1974); *Donovan* v. *Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970).

[103] *Halperin* v. *Kissinger, supra* note 5, 434 F.Supp. at 1195. Plaintiffs attribute their course to a pre-*Piphus* belief that injury should be presumed, based on the lower court rulings in *Piphus* v. *Carey*, 545 F.2d 30 (7th Cir. 1976), and *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). *See* note 100 *supra*. We see no reason why, on remand, they should not be permitted to amend their pleadings and attempt to demonstrate injury.

[104] *Seaton* v. *Sky Realty Co., supra* note 102, 491 F.2d at 637-638.

[105] *Tatum* v. *Morton*, 562 F.2d 1279, 1282 (D.C. Cir. 1977) (First Amendment claim).

ing such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts." [106]

IV. The Immunity Defense

All individual defendants claim an absolute immunity from civil damage suits for actions undertaken in their official capacities. The District Court rejected these claims, and we agree with that ruling. Defendants, including former President Nixon, are entitled to a qualified immunity on both the Fourth Amendment and the Title III claims if they can show that they had reasonable grounds for believing their actions were legal (the "objective" basis) and that there was no malice or bad faith in either the initiation or the conduct of the wiretapping (the "subjective" basis).[107] Because former President Nixon advances particular arguments in support of his own absolute immunity, we will consider his status separately.

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[106] *Id.* at 1287 (Wilkey, J., concurring). Although not directly controlling for Fourth Amendment violations, *see* note 65 *supra*, it is certainly illuminating that Congress in Title III identified $100 a day as the proper award for victims of unlawful wiretapping. *See* 18 U.S.C. § 2520 (1976). One would expect substantial correspondence between that legislatively established figure for compensation and the amount appropriate for Fourth Amendment violations involving similar harms flowing from similar actions.

[107] *See Zweibon I, supra* note 49, 516 F.2d at 670-673.

A

Officials making adjudicative and prosecutorial decisions are absolutely immune from civil suit based on such actions. This doctrine assumes that the initiation of a prosecution and the resolution of a dispute are especially likely to incite individualized wrath,[108] and that the review processes of the judicial system provide an automatic safeguard against improper actions.[109] Absolute immunity is not available, however, for those same officials for acts not involving adjudication or prosecution.[110]

In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Supreme Court outlined two bases for qualifying the immunity from suit enjoyed by Executive officials: (1) without such qualification the damage actions contemplated by *Bivens* would be "drained of meaning" and many constitutional violations would go

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[108] *Butz* v. *Economou*, 438 U.S. 478, 509-510, 512 (1978); *Imber* v. *Pachtman*, 424 U.S. 409, 424-426 (1976).

[109] *Butz* v. *Economou*, *supra* note 108, 438 U.S. at 512; *Imbler* v. *Pachtman*, *supra* note 107, 424 U.S. at 427; *see also Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). *See generally Stump* v. *Sparkman*, 435 U.S. 349 (1978).

[110] Although defendant Mitchell might be entitled to prosecutorial immunity for some of his actions as Attorney General, this is not such a case since there is no allegation that the Halperin surveillance was part of a criminal prosecution. *See Forsyth* v. *Kleindienst*, —— F.2d ——, —— (3d Cir. No. 78-1611, decided May 22, 1979) (slip op. at 21-22); *Apton* v. *Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974); *Briggs* v. *Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

unremedied;[111] and (2) since state officials may be held liable for such violations,[112] it would "stand the constitutional design on its head" if the courts established "a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials * * *."[113]

The *Economou* Court adopted for federal officials the objective and subjective standards for qualified immunity of *Wood* v. *Strickland*:[114]

> [An official is] not immune * * * [A] if he knew or reasonably should have known that the action he took * * * would violate the constitutional rights of the [person] affected, or [B] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury * * *. * * *

We stress that only one of these two standards need be satisfied in order for a defendant to lose his immunity from suit.[115]

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[111] 438 U.S. at 501.

[112] *See* 28 [*sic*] U.S.C. § 1983 (1976).

[113] *Butz* v. *Economou, supra* note 108, 438 U.S. at 504.

[114] 420 U.S. 308, 322 (1975); *See Procunier* v. *Navarette*, 434 U.S. 555, 562, 565-566 (1978); *Pierson* v. *Ray, supra* note 109, 386 U.S. at 557.

[115] We follow the holding in *Zweibon I, supra* note 49, 516 F.2d at 670-671, that the good faith defense specified in § 2520 of Title III, 18 U.S.C. § 2520 (1976), is the same as in constitutional cases. Because Judge Robb concurred in the plurality's position on this point, 516 F.2d at 688, that holding was reached by a majority of this court.

To reduce the potential for harassment of Executive officials, the Supreme Court has recommended resolution of the immunity issue, when possible, on summary judgment.[116] This course is best suited for handling the objective basis for qualified immunity. Courts should be able to determine at the pretrial stage whether there is a genuine issue of material fact as to the reasonableness of a defendant's belief that he was acting legally. On the subjective criterion—which "turns on officials' knowledge and good faith belief" [117]—summary action may be more difficult. Questions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved.[118] Nevertheless, in view of the Supreme Court's emphasis on the importance of summary procedures in suits like this one, District Courts must carefully examine any pretrial claim by a defendant that a plaintiff has not raised a genuine issue of material fact as to defendant's subjective

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[116] *Butz* v. *Economou, supra* note 108, 438 U.S. at 508.

[117] *Apton* v. *Wilson, supra* note 110, 506 F.2d at 95.

[118] *See Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (summary judgment "should be used sparingly * * * where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot"). For application of this principle to cases involving constitutional claims, *see* cases cited in note 85 *supra*. *See also Paton* v. *LaPrade, supra* note 101, 524 F.2d at 872; *Abramson* v. *Mitchell*, 459 F.2d 955 (8th Cir. 1972).

good faith.[119] Should the court conclude on the record before it that the defendant is not entitled to a judgment as a matter of law,[120] the court must move be-

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[119] A formulation of the summary judgment standard in a similar context was offered by the Seventh Circuit in *Askew* v. *Bloemker, supra* note 85, 548 F.2d 679, involving a suit against state officials for violation of Fourth Amendment rights:

> Plaintiffs are entitled to take to the jury the state-of-mind defense on which the defendants herein rely as long as plaintiffs have adduced specific facts from which a reasonable man, viewing all the evidence in the light most favorable to plaintiffs and resolving all testimonial conflicts in the same manner, could infer that the defendants were acting * * * in bad faith * * *.

Of course, at the pleading stage plaintiffs must allege that the defendants acted with "malicious intention" in order to proceed with a claim that immunity should be denied on the subjective criterion. *Procunier* v. *Navarette, supra* note 114, 434 U.S. at 561.

[120] Since pretrial discovery has concluded in this case, *see* note 85 *supra*, we do not attempt to sketch comprehensive standards guiding the discretion of District Judges faced with requests to permit detailed discovery of the mental processes and confidential discussions of Executive decision-makers. We advert to the problem only because we believe close control of discovery in suits against such officials is essential to the preservation of meaningful official immunity. *See United States* v. *Nixon, supra* note 59, 418 U.S. at 703-713 (recognizing a presumptive privilege for confidential conversations between a President and his close advisors, but finding that general interest to be overborne by a specific showing of need for such evidence in a pending criminal trial); *United States* v. *Reynolds*, 345 U.S. 1, 6-12 (1953) (military secrets); *cf. United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (mental processes of administrative decision-makers). Where a showing of need has prevailed over a broad claim of privilege, a District Court might be well advised to

yond summary procedures.[121] At trial defendants would have to establish their subjective good faith as an affirmative defense.[122]

As to defendants Mitchell and Haldeman, the District Court found "their activities relating to the wiretap *continuance* unreasonable." [123] On the subjective claim, the court noted:

> The evidence here reflects a twenty-one month wiretap continuance without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents.[124]

The District Court also applied the objective standard, finding that the defendants violated the Fourth

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require that inquiries first be made of subordinate officials before sanctioning discovery that imposes on the time of high-level officials.

[121] *Apton* v. *Wilson, supra* note 110, 506 F.2d at 94-95. Judge Gesell in his concurrence has highlighted the central problem posed by the post-*Economou* immunity doctrine: How to make effective the use of summary procedures in preventing harrassment of Executive officials. We believe that the approach we take here conforms with the requirements of Rule 56 of the Federal Rules of Civil Procedure, and with the concerns of the *Economou* Court for the interests of both potential plaintiffs and potential defendants.

[122] *See Zweibon I, supra* note 49, 516 F.2d at 607 n.18.

[123] *Halperin* v. *Kissinger, supra* note 4, 424 F.Supp. at 845 (emphasis added).

[124] *Id.*

Amendment, and, "[l]ike any other citizen, these officials are charged with knowledge of established law and must be held accountable for personal misconduct." [125]

We find no basis for disturbing these rulings. Certainly there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution, and the record contains ample support for the trial court's ruling on bad faith. Under the terms of our remand, however, the District Court will also have to consider any claim by defendants that they are immune from liability for their failure to acquire a warrant for the wiretap, a question which the District Court has not directly addressed.[126] In a complex case like this one, the District Court must undertake a particularized inquiry into the immunity available for each alleged type or period of constitutional or statutory violation in order to safeguard both the individual rights asserted by the Halperins and the freedom of Executive officials to act.

B

In order to accept defendant Nixon's argument that he, as a former President, is absolutely immune

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[125] *Id.*

[126] On the District Court's treatment of the Fourth Amendment warrant requirement, *see* p. 28 *supra*. In addition, the warrant provision of Title III might also be relevant to this case if the District Court determines on remand that there was no national security basis for the initiation of the wiretap. *See* p. 25 *supra*.

from this suit, we would have to hold that his status as President sets him apart from the other high Executive officials named as defendants to this action. Such a distinction would have to rest on a determination either that the Constitution impliedly exempts the President from all liability in cases like this or that the repercussions of finding liability would be drastically adverse. Because we are unable to make that distinction, we do not believe he is entitled to absolute immunity to a damage action by a citizen subjected to an unconstitutional or illegal wiretap.

1. The constitutional scheme betrays no indication that any kind of immunity was intended for the President or the Executive Branch. While congressmen enjoy the privileges of the Speech and Debate Clause of Article I,[127]

> [t]he Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight. * * * [128]

In addition, there are indications that the Constitutional Convention was presented with the question of Executive privileges and chose not to grant any.[129]

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[127] U.S. CONST., Art. I, § 6, cl. 1.

[128] *Nixon* v. *Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (*en banc*).

[129] At one point in the Convention's deliberations, James Madison suggested "the necessity of considering what privileges ought to be allowed to the Executive," 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 503 (1911), but the proposal was not taken up. Charles Pinckney,

The Convention did specify, however, that an impeached President may still be tried in the courts for any offense.[130]

> By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens. * * * [131]

2. The doctrine of separation of powers wisely counsels the judiciary to act with care when review-

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who was intimately involved in consideration of the privileges question, *see id.* at 502; 3 *id.* at 605-606, explained to the United States Senate in 1800 why Madison's suggestion went unheeded:

> . . . Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned [speech and debate] for Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilge to what was necessary, and no more.

3 *id.* at 385.

[130] U.S. CONST., Art. 1, § 3, cl. 7.

[131] *Nixon* v. *Sirica, supra* note 128, 487 F.2d at 711. In *United States* v. *Nixon, supra* note 59, the Supreme Court acknowledged a limited Executive privilege of confidentiality, 418 U.S. at 706-707, but that conclusion was based on practical considerations of government, not constitutional text. We review the likely practical effect of our ruling today in text at notes 137-141 *infra.*

ing actions by other branches, but the courts may not evade their constitutional responsibility to delineate the obligations and powers of each branch. Thus, although courts lack power to grant injunctive relief against prospective presidential actions that may be discretionary,[132] Presidents are scarcely immune from judicial process. Courts have intervened in defense of congressional lawmaking prerogatives to block improper presidential exercise of emergency powers [133] and to assert the President's duty to execute mandatory legislative instructions.[134] They have also ordered production of presidential documents needed for orderly functioning of the criminal justice system.[135] Clearly, a proper regard for separation of powers does not require that the courts meekly avert their eyes from presidential excesses while invoking a sterile view of three branches of government entirely insulated from each other.[136] Such an abdica-

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[132] *See Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866); *see also Georgia* v. *Stanton*, 73 U.S. (6 Wall.) 50 (1867).

[133] *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra* note 55.

[134] *Nat'l Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

[135] *United States* v. *Nixon*, *supra* note 59.

[136] *See Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra* note 55, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). *See also id.* at 610 (Frankfurter, J., concurring). Judge McGowan has articulated an approach to separation of

tion of the judicial role would sap the vitality of the constitutional rights whose protection is entrusted to the judiciary.

3. We also find no basis for absolute presidential immunity on what might be termed prudential grounds. We do not believe that any inhibiting effect such suits might have on the presidential will to act should hinder effective governance of the nation. To some extent, of course, the denial of absolute immunity is intended to affect Executive behavior that threatens to violate constitutional rights. We believe, however, that suits that may successfully be pursued against a President will be quite rare.[137]

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powers questions that respects both the separateness and the interdependence of the three branches:

> [S]eparation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact of an Act on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch. * * *

Nixon v. *Administrator of General Services*, 408 F.Supp. 321, 342 (D. D.C. 1976) (three-judge court), *aff'd*, 433 U.S. 425 (1977).

[137] *Cf. Dellums* v. *Powell*, 561 F.2d 242, 247 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977) (permitting civil damage action for constitutional deprivation despite disruption of presidential confidentiality, partly because "the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled").

And if we are serious about providing a remedy for constitutional violations, there can be no rational basis, as the *Economou* Court emphasized, for holding inferior officials liable for constitutional violations while immunizing those higher up.

> Indeed, the greater power of such [higher] officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. * * *[138]

In addition, the doctrine of qualified immunity, as elaborated by the Supreme Court in *Scheuer* v. *Rhodes* and by this court in *Apton* v. *Wilson*, makes allowance for the additional demands on the time and attention of a Chief Executive.[139] The President, like all citizens, must be held to know the relevant law, but he "may be entitled to consult fewer sources and

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[138] *Butz* v. *Economou, supra* note 108, 438 U.S. at 506.

[139] *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-249 (1974); *Apton* v. *Wilson, supra* note 110, 506 F.2d at 91-92. In *Scheuer* v. *Rhodes* the Supreme Court stressed the "virtually infinite" range of decisions and choices that may face a Chief Executive in a situation:

> [S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. * * *

416 U.S. at 247. As this court has stated, such concerns "go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief;' they do not make the qualified immunity itself inappropriate." *Apton* v. *Wilson, supra* note 110, 506 F.2d at 93.

expend less effort inquiring into the circumstances of a localized problem." [140] This sliding scale would apply with even greater force if the President were acting in an emergency situation. The President would lose his immunity only if plaintiffs could show that he acted with "actual malice" [141] or that he failed to meet a statutory or constitutional obligation that was clear under the circumstances as understood at the time.[142] Under this approach plaintiffs would have substantial difficulty in defeating a President's claim of immunity, an outcome that helps satisfy our concern that suits like this one would place major and unwarranted demands on a President's time. In considering the case to be made out by plaintiffs before trial,[143] District Courts should be sensitive to the extraordinary practical difficulties confronting a President who is charged in such a suit.[144]

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[140] *Apton* v. *Wilson, supra* note 110, 506 F.2d at 93.

[141] *See Wood* v. *Strickland, supra* note 114, 420 U.S. at 321.

[142] *See Scheuer* v. *Rhodes, supra* note 139, 416 U.S. at 246-247.

[143] *See* text at notes 119-122 *supra.*

[144] Stressing the crucial importance to democratic government of independent lawmakers, the Supreme Court has recognized an absolute immunity for state and local legislators which parallels the protection afforded to federal lawmakers by the Speech and Debate Clause of the Constitution. Such immunity, the Court has said, spares the legislators the "cost and inconvenience and distractions" of a public trial, and protects them from speculation by a finder of fact as to their motives for legislative actions. *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951); *Lake County Estates, Inc.* v. *Tahoe Regional*

4. We do not think that the personal burden on the President of having to answer civil suits like this one is so great as to justify absolute immunity. Like other Executive officials, he is represented by the Government if he is sued for his official actions,[145] and there seems to be no basis for greater solicitude for the personal finances of a President ordered to pay damages for his constitutional violations than for a governor or a cabinet officer.[146]

Planning Agency, —— U.S. ——, ——, 47 U.S. L. WEEK 4256, 4260 (March 6, 1979). Taken in the abstract, these considerations might seem to support absolute immunity for the President, or, indeed, for any Executive official. We do not, howexer, find them compelling here. *Scheuer* v. *Rhodes*, *supra* note 139, and *Butz* v. *Economou*, *supra* note 108, establish that high Executive officials in state or federal positions do not enjoy the same immunity as lawmakers do. Because no defensible distinction can be made between the President and other high Executive officers for immunity purposes, we find no basis for applying to the President the absolute immunity of legislators.

[145] 28 C.F.R. §§ 50.15-50.16 (1978). Representation may be denied if the Department of Justice determines "that it is not in the interest of the United States to represent the employee." *Id.* § 50.15(b)(4). *See also* 28 U.S.C. § 516 (1976).

[146] Legislation is currently pending in Congress that would provide a cause of action against the federal government for individuals harmed by officials acting in the course of duty. H.R. 193, 96th Cong., 1st Sess. (1979). A similar measure was the subject of hearings in the last Congress and was favorably reported by the subcommittee considering it. *Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee*, 95th Cong., 2d Sess. (1978). By waiving sovereign immunity against *Bivens* suits, such legislation would divert litigation from individual officials.

Finally, we think the application of qualified immunity to defendant Nixon is mandated by our tradition of equal justice under law. The President is the elected chief executive of our government, not an omniscient leader cloaked in mystical powers. This court has observed that "[s]overeignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." [147] The Supreme Court noted this truth in *Economou* when it quoted from *United States* v. *Lee*: [148]

> No man in this country is so high that he is above the law. No officer of the law may set that law at definance with impunity. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it.[149]

V. Kissinger's Summary Judgment Motion

The District Court granted summary judgment in favor of defendant Kissinger on the ground that he played an "inactive role" in the surveillance and lacked "oversight authority." [150] We think this ruling was error, since plaintiffs raised genuine issues of material fact as to Kissinger's role in the installation

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[147] *Nixon* v. *Sirica*, *supra* note 128, 487 F.2d at 711.

[148] 106 U.S. (16 Otto) 196, 220 (1882).

[149] *Butz* v. *Economou*, *supra* note 108, 438 U.S. at 506.

[150] *Halperin* v. *Kissinger*, *supra* note 4, 424 F. Supp. at 846.

and maintenance of the wiretap.[151] They demonstrated that Kissinger was involved to some extent in the decision to initiate a surveillance program,[152] that he monitored the product of the surveillance for a full year,[153] and that on at least one occasion he directly requested continuation of the Halperin tap.[154]

We, of course, intimate no suggestion as to Kissinger's liability, but only hold that plaintiffs made a sufficient showing as to his supervisory role to survive a motion for summary judgment.

Accordingly, the judgment of the District Court is reversed and this case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[151] For standards for summary judgment, *see* note 85 *supra*.

[152] *See* text at note 8 *supra*.

[153] That is, from May 1969 until May 1970. *See* text at notes 39-40 *supra*.

[154] *See* text at notes 24-27 *supra*.

GESELL, *District Judge, concurring*: I concur in the foregoing opinion except as indicated below.

This suit against a President of the United States and high cabinet-level officials brings into sharp focus the practical difficulties presented by the intimation in *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), which is today accepted by this Court, that the objective and subjective good faith components of the qualified immunity defense can usually be resolved without trial by summary judgment after pretrial discovery. The majority is willing to extend no more protection to top federal officials than is afforded by the normally applicable summary judgment principles. As I see it, this means that if a plaintiff can establish a genuine material issue of fact as to any element of the immunity defense the case will have to proceed to trial. In my view this approach substantially undermines, if not destroys, the immunity doctrine.

We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery is wide-

ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved. A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient. In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits.

The effect of this development upon the willingness of individuals to serve their country is obvious. Not only are the personal funds of such officials placed at hazard but many of these cases are political in character, involve highly controversial acts, and will necessarily embroil juries in passing upon the intricacies of executive decisionmaking.

In order to give the immunity doctrine some genuine force and effect, it appears to me that a plaintiff should be required to make a stronger showing than the Court's opinion requires on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before the trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and

convincing evidence, that the official failed to act with subjective or objective good faith.

The problems involved in this area are particularly acute when one considers whether or not a President of the United States should be forced to go to trial and risk being held personally liable in damages where a private individual citizen claims injury as a result of acts taken by the President within the outer perimeters of his duties. Even accepting the view that the absolute immunity defense does not automatically protect a President, but only attaches to those who perform judicial and prosecutorial functions, certainly a rule should be developed which affords more deference to the Office of the President. Our constitutional traditions and decisions such as *United States* v. *Nixon*, 418 U.S. 683 (1974), strongly suggest that in view of a President's grave, complex and unique responsibilities he should receive substantial protection while in office and thereafter from individual damage suits which necessarily intrude into his mental processes and his day-to-day relations and communications with his most intimate advisors.

In short, I urge a more exacting standard be placed on the showing a plaintiff must make before proceeding to trial in the face of a properly presented qualified immunity claim.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS

Aug. 5, 1977

MEMORANDUM OPINION AND ORDER

JOHN LEWIS SMITH, Jr., J.

Following earlier proceedings in this case, the Court found that former President Richard Nixon, his White House Assistant, H. R. Haldeman, and Attorney General John Mitchell had violated the Fourth Amendment rights of plaintiffs Morton Halperin, his wife, and three children by subjecting them to a twenty-one month telephone wiretap. *Halperin* v. *Kissinger*, D.C., 424 F.Supp. 838 (1976). Now before the Court is the question of monetary and injunctive relief.

While conceding that they have suffered no palpable injury,[1] plaintiffs nevertheless insist on damages

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[1] "No plaintiff claims any loss of employment or income resulting from the electronic surveillance overhearings. . . . the disclosure of the electronic surveillance. . . . [or] the purported use of the electronic surveillance." PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' REQUEST FOR ADMISSIONS.

measured by the $100 per day standard set forth in Section 802 of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2520. *See Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594, 663-64 (1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). This contention is without merit. The Court has previously ruled that defendants were not bound by the procedural requirements of that statute, and it would be incongruous to subject them to its penalties.

Plaintiffs also seek compensatory damages relying on the theory that compensable injury is presumed in damage suits for violation of constitutional rights. *See Wayne* v. *Venable*, 260 F. 64 (8th Cir. 1919); *Basista* v. *Weir*, 340 F.2d 74 (3d Cir. 1965); *Hostrop* v. *Board of Junior College District No. 515*, 7 Cir., 523 F.2d 569, *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976).[2] That presumption cannot be invoked here. Speaking for the Court in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, Justice Brennan limited the damages remedy to only those who "*can demonstrate an injury consequent upon the violation* by federal agents of [their] Fourth Amendment rights". 403 U.S. 388, 397, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619

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[2] *See also Ashby* v. *White*, 92 Eng.Rep. 710, 2 Ld.Raym. 938 938 (1703); *Nixon* v. *Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Nixon* v. *Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Piphus* v. *Carey*, 545 F.2d 30 (7th Cir. 1976), *cert. granted*, 430 U.S. 964, 97 S.Ct. 1642, 52 L.Ed.2d 355 (1977).

(1971) (emphasis supplied). *See Zweibon* v. *Mitchell, supra* at 659. In view of the fact that there is no demonstrable injury here, plaintiffs are not entitled to an award of compensatory damages.

Punitive damages are similarly inappropriate.[3] As stated in the prior opinion, "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information." Despite the Court's rejection of defendants' good faith defense, their conduct cannot fairly be characterized as a wanton, reckless or malicious disregard of plaintiffs' rights justifying the imposition of punitive sanctions. *See Knippen* v. *Ford Motor Company*, 546 F.2d 993, 1002 (D.C. Cir. 1976).

It is evident, therefore, that the only pecuniary relief available to plaintiffs is nominal damages in the amount of One Dollar.[4]

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[3] The availability of punitive damages in *Bivens* actions is unsettled in this Circuit. *Compare Hartigh* v. *Latin*, 158 U.S.App.D.C. 289, 485 F.2d 1068, 1072 (1973), *cert. denied*, 415 U.S. 948, 94 S.Ct. 1470, 30 L'Ed.2d 564 (1974) *with Zweibon* v. *Mitchell*, 516 F.2d 594, 659, *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). *See Payne* v. *District of Columbia*, 559 F.2d 809 (D.C. Cir. 1977) (Tamm, J., Concurring). *See also Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1973); *Bell* v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

[4] *See Chesapeake & Potomac Telephone Company* v. *Clay*, 90 U.S.App.D.C. 206, 194 F.2d 888 (1952). *Cf. Magnett* v. *Pelletier*, 488 F.2d 33 (1st Cir. 1973) ($1 nominal damages); *See generally*, J. Stein, Damages and Recovery §§ 177-181 (1972).

Plaintiffs further ask for an order enjoining defendants from unlawfully intercepting plaintiffs' future conversations and from using or disclosing information concerning past wiretaps. Mr. Haldeman and Mr. Mitchell are in prison. Mr. Nixon is in voluntary seclusion and is prohibited by the Twenty-Second Amendment from regaining the Office of President. Consequently, the proposed relief is unnecessary.

Plaintiffs seek additional injunctive relief with regard to the disposition of the records of the surveillance. They agree that the original logs, summary letters, authorizations, and other records relating to the wiretap should be retained by the Department of Justice with future access to be determined by the Court. But they insist that they should have the only copy of these records and should be relieved of their obligation, under the April 1, 1974 Protective Order, not to disclose to anyone matter contained therein. The government acquiesces in plaintiffs' request for a copy of the logs but asks that it also be permitted to keep a copy for the duration of three similar, pending cases.[5] This is a reasonable request and it will be granted by the Court. However, the government contention that any gag order should apply to all parties, not just defendants, is viewed in a different light. There is no compelling reason for prohibiting

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[5] *Ellsberg* v. *Mitchell*, C.A. 1879-72 (D.D.C.); *Lake* v. *Ehrlichman*, C.A. 74-887 (D.D.C.); *Smith* v. *Nixon*, C.A. 76-798 (D.D.C.).

plaintiffs from revealing the contents of their own conversations.

Finally Dr. Halperin requests that his security file be amended to include a statement by Dr. Kissinger that the wiretap produced no information impugning either Dr. Halperin's loyalty or his discretion. General Haig had mistakenly informed the FBI that Dr. Halperin was relieved of his National Security Council position because of information gathered from the tap. Fairness requires inclusion of the Kissinger statement, and the government has agreed to add it.

Accordingly, it is by the Court this 5th day of August, 1977

ORDERED that defendants Nixon, Haldeman and Mitchell are liable, jointly and severally, to each of the plaintiffs for nominal damages in the amount of One Dollar; and it is further

ORDERED that the Court's April 1, 1974 Protective Order be, and the same hereby is, dissolved, and all files and documents previously covered by that Order be disposed of as follows: (A) originals of all logs, summary letters, authorizaitons, and records of any other character relating to plaintiffs' wiretap shall be kept in the files of the Department of Justice, with future access to be governed by order of this Court after plaintiffs have been given notice and the opportunity to be heard; (B) after the termination of any appeals, copies of records produced pursuant to the Protective Order shall be destroyed by

all parties except the government, which shall be permitted to retain one copy for the duration of Civil Actions 1879-72, 77-887 and 76-798, and plaintiffs, who shall be permitted to retain a copy for their own use; and it is further

ORDERED that all defendants are permanently enjoined from making any use or disclosure of the intercepted wire communications of the plaintiffs; and it is further

ORDERED that defendants shall insert in Dr. Halperin's security file (A) that portion of General Haig's deposition in which he stated that his FBI interview form 302 incorrectly indicated that Dr. Halperin had been relieved of his National Security Council position because of information gathered from the wiretap, and (B) that portion of Dr. Kissinger's deposition in which he stated that he knew of no wiretap information inpugning either Dr. Halperin's loyalty or his discretion.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 1187-73

MORTON H. HALPERIN, ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER, ET AL., DEFENDANTS

Dec. 16, 1976

OPINION

JOHN LEWIS SMITH, Jr., District Judge.

This action under the First, Fourth, Fifth, and Ninth Amendments to the Constitution and under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* (Title III), seeks declaratory and injunctive relief and money damages for defendants' allegedly illegal wiretapping of plaintiffs' home telephone. Plaintiffs are Morton H. Halperin, a former Chief of the National Security Council Planning Group, his wife Ina, and their three minor children. Defendants are Henry A. Kissinger, Richard M. Nixon, John N. Mitchell, H. R. Haldeman, Alexander M. Haig, William C. Sullivan, Robert C. Mardian, Clarence Kelley and Jeb Stuart Magruder (hereinafter cited as federal defendants), John Ehrlichman, and the Chesapeake and Potomac Telephone Company (C&P). The matter is

before the Court on plaintiffs' Motion for Summary Judgment against the federal defendants and Motion for Partial Summary Judgment against defendant C&P, federal defendants' Motion for Summary Judgment, defendant Ehrlichman's Motion for Summary Judgment, defendant C&P's Motion for Summary Judgment, and defendant Nixon's Motion to Dismiss.

I

Many of the central facts in this case are undisputed and can be recounted briefly. Between February and April of 1969, Nixon Administration officials grew increasingly concerned about leaks to the press of certain foreign policy documents and classified information. The leaks related to United States policies in Vietnam, China, the Soviet Union, Europe, and the Mideast. In late April 1969, President Nixon, Attorney General Mitchell, National Security Affairs Advisor Kissinger, and FBI Director Hoover met to discuss the problems of leaks and to formulate a plan for stopping unauthorized disclosures. After receiving the Attorney General's legal opinion on the matter and assurances from the FBI Director about previous Executive practice, President Nixon authorized a program of electronic surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy of the United States. Those to be wiretapped would be selected on the basis of access to information leaked, material in security files, and evidence developed as the surveillance proceeded.

On May 9, 1969, following the appearance of an article in the *New York Times* concerning United States B-52 bombing raids in Cambodia, wiretaps were requested upon four individuals, including plaintiff Halperin. The names were provided by Dr. Kissinger and were transmited by Colonel Haig to the Assistant Director of the FBI's Domestic Intelligence Division, William Sullivan. Three days later, Attorney General Mitchell gave his authorization for the wiretap of the Halperin home telephone.[1] This wiretap remained in effect approximately twenty-one months.

During this period FBI agents monitored telephone communications and prepared logs of many of the conversations. Letters summarizing some of the discussions were prepared and forwarded to FBI Director Hoover for transmittal to the President (through Presidential Counsel Ehrlichman) and to Dr. Kissinger (through Colonel Haig). On occasion, summaries of interceptions were also sent to Attorney General Mitchell. After May 1970, the FBI's summary letters were sent only to Presidential Assistant Haldeman, who was to screen the letters for relevant information. On February 10, 1971, the Halperin wiretap was removed.

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[1] Interceptions and monitoring of the Halperin home telephone began on the evening of May 9, 1969. The Halperin wiretap was one of 17 wiretaps instituted against 13 government officials and four newsmen between May 1969 and February 1971. All of these individuals were suspected of leaking or receiving classified government documents.

Subsequently, after discussions involving Mr. Sullivan, Assistant Attorney General Mardian, President Nixon, and Mr. Ehrlichman concerning disposition of the wiretap documents, the records were taken from the FBI's custody and placed in a safe in Ehrlichman's White House office. Failure to produce the documents resulted in the dismissal of a criminal case involving the Pentagon Papers, *United States* v. *Russo and Ellsburg*, No. 9373 (C.D.Cal., Order of May 11, 1973). On May 12, 1973, the Halperin wiretap records were recovered from Ehrlichman's safe and returned to the FBI. Plaintiffs filed this action on June 14, 1973.

II

A

A threshold question confronting the Court is the applicability to this action of Title III's procedures and remedies for electronic surveillance. Although this statutory scheme was in effect during 1969-1971 when defendants' wiretapping activities occurred, the legality of warrantless national security wiretaps has been considered only in subsequent judicial decisions. *United States* v. *United States District Court (Keith)*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594 (1975); cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 187 (1976).[2] The *Keith*

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[2] *See generally United States* v. *Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976) cert. denied —— U.S. ——, 97 S.Ct. 1155, 51 L.Ed.2d —— (1977); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 157-59 (D.D.C. 1976).

case held that, "[N]othing in [18 U.S.C.] § 2511(3)[3] was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security." 407 U.S. at 308, 92 S.Ct. at 2132. (Emphasis in original.) The Supreme Court in *Keith* proceeded to hold the challenged wiretaps invalid under the Fourth Amendment but did not resolve their legality under Title III. *Compare id.* 407 U.S. at 335-44, 82 S.Ct. 2125 (White, J., concurring in judgment).

In *Zweibon*, the Court of Appeals for this Circuit stated that, ". . . Congress intended that applicability of Title III procedures and remedies in the national security context be contingent upon further judicial

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[3] The statute provides "Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. *Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.* The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (Emphasis supplied).

pronouncements concerning the constitutional [requirements of national security wiretaps], since Section 2511(3) expressly declined to restrict 'constitutional' Executive surveillance." 516 F.2d at 671. *Zweibon* also pronounced that a warrant—and full compliance with Title III's procedural protections, *e.g.*, 18 U.S.C. §§ 2518-20—are necessary for wiretaps upon a domestic group lacking a relationship with a foreign power. 516 F.2d at 614, 663-70.[4] However, the Court left for remand defendants' contention that the *Keith* and *Zweibon* holdings should not be applied retroactively in a damage suit based upon pre-*Keith* and pre-*Zweibon* surveillance. *Id.* at 607 n. 18.

Having reviewed the entire record in this case, including the extensive depositions and answers to interrogatories, the Court holds as a matter of law that defendants have made out a sufficient good faith defense against the retroactive application of *Keith*

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[4] Despite federal defendants' eleventh hour argument, there is no evidence in the record that this case involved a "foreign surveillance." The *Zweibon* decision carefully delineated the difference between foreign and domestic surveillance and rejected outright any open-ended rationale, such as "national security" or conduct "affecting foreign realtions," to justify warrantless surveillance. 516 F.2d at 651-55; *see also Keith, supra,* 407 U.S. at 309 n.8, 92 S.Ct. 2125.

Congress has recently considered the hitherto uncharted and unregulated area of foreign surveillance. S. 3197, as reported, defines foreign intelligence surveillance and contains special procedures for obtaining a judicial warrant prior to any such surveillance. *See* S.Reps. Nos. 1035, 1161, 94th Cong., 2d Sess. (1976).

and *Zweibon*. Without engaging in an exhaustive analysis of legislative history or of pre-*Keith* decisions, the Court notes the indisputable difficulties and ambiguities presented by § 2511(3). Interpretation of this statute and of the President's domestic power thereunder troubled legislators, law enforcement personnel, and courts until the *Keith* decision, when the Supreme Court ruled that the statute was merely a disclaimer of intent to limit constitutionally proper Executive actions. Thus, at least until 1972, and perhaps until the 1975 *Zweibon* decision, see *Keith, supra*, 407 U.S. at 309 n. 8, 92 S.Ct. 2125, the meaning and the limits of § 2511(3) were open issues.

Defendants should not be held to have acted at their peril in this vacuum. In view of the confused state of the law and the 30-year history of similar Executive actions, *see Keith, supra*, 407 U.S. at 310-11, 92 S.Ct. 2125; *Zweibon, supra*, 516 F.2d at 616-19, the Court finds that defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance. The Court further finds no genuine issue of fact in the record controverting this good faith belief on defendants' part. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 242-50, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Apton* v. *Kuhn*, 165 U.S.App.D.C. 22, 506 F.2d 83, 91-94 (1974); *see also Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (standards for nonretroactivity); *Morales* v. *Hamilton*, 391 F.Supp. 85, 89-91 (D.Ariz. 1975). Accord-

ingly, plaintiffs have no cause of action under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

B

The compatibility of the wiretap with the Fourth Amendment is a different matter.[5] Assuming *arguendo* the inapplicability of the warrant provision, *cf. Keith, supra; Katz* v. *United States*, 389 U.S. 347, 358 n. 23, 88 S.Ct. 507, 19 L.Ed.2d 576 (1976), there can be no serious contention that the Fourth Amendment's independent requirement of reasonableness is suspended in the area of national security searches and seizures. In other words, even if § 2511(3) and prior presidential practice could be invoked to authorize warrantless wiretaps, national security surveillance still must be "exercised in a manner compatible with the Fourth Amendment." *Keith, supra*, 407 U.S. at 320, 92 S.Ct. at 2138; *cf. United States* v. *Robel*, 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967). To resolve the wiretap's reasonableness under the Fourth Amendment, the Court must examine and balance the varying interests presented here; i.e., "the duty of [the] Government to protect the domestic [and foreign] security, and the potential

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[5] The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

danger posed by [allegedly] unreasonable surveillance to [plaintiffs'] privacy and free expression." *Keith, supra*, 407 U.S. at 314-15, 92 S.Ct. at 2135.

There was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information. The Nixon Administration was seeking new approaches and solutions to a number of persistent world problems, e.g., the Vietnam war, the SALT talks, and Sino-American relations. Unauthorized disclosures could reasonably be viewed as impeding progress and affecting policy-makers' discussions in these areas. It was therefore determined by the highest Executive officials to employ whatever techniques were necessary to investigate and curb leaks. Wiretaps were considered to be one such investigative tool. Specific criteria were established for suspects, including their access to leaked information and their prior security record. A limited number of persons were subjected to such electronic surveillance, many for a relatively short time.

On the other hand, totally apart from objections concerning lack of probable cause in *his* selection, the wiretap on plaintiff Halperin and his family was maintained for a period of twenty-one months. At no time were there any reviews or evaluation of the material obtained through the electronic surveillance.[6]

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[6] *Compare* 18 U.S.C. § 2518(5) (thirty days limit to wiretaps, unless extension granted based upon new showing of probable cause); Memorandum of May 6, 1969 from Attorney General Mitchell to FBI Director Hoover, at 5 (renewal requirements for national security electronic interceptions);

No attempt was made to minimize the interception of plaintiffs' conversations, either as regards individuals intercepted or information gathered. *Compare Berger* v. *New York, supra,* 388 U.S. at 58-59, 87 S.Ct. 1873. No further investigation or questioning of Mr. Halperin took place during this period. In addition, the tap continued after he left the National Security Council to engage in various antiwar efforts, and long after many of the other national security wiretaps were removed. Numerous summary letters in the later course of the surveillance relate solely to Halperin's political activities and beliefs.

The wiretap thus appears to have developed into a dragnet which lacked temporal and spatial limitation. It represents the antithesis of the "particular, precise, and discriminate "procedures required by the Supreme Court in numerous Fourth Amendment cases. *See, e.g., Osborn* v. *United States,* 385 U.S. 323, 329-30, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966); *Berger* v. *New York, supra,* 388 U.S. at 55-60, 87 S.Ct. 1873; *Katz* v. *United States, supra,* 389 U.S. at 354-57, 88 S.Ct. 507. The surveillance constituted an invasion of plaintiffs' privacy and freedom of expres-

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Deposition of John N. Mitchell at 9-10 (90 day renewal procedures under Justice Department regulations).

The Supreme Court in 1967 strongly condemned the extended duration of interceptions authorized by a New York statute. *Berger* v. *New York,* 388 U.S. 41, 59-60, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *cf.* S.Rep. No. 1097, 90th Cong., 2d Sess. 101, U.S. Code Cong. & Admin. News 1968, p. 2112 (1968) (Title III duration and renewal provisions tailored to meet constitutional requirements set forth in *Berger*).

sion. For these reasons, even granting the inapplicability of the general warrant requirement, the Court finds the wiretap *per se* unreasonable under the Fourth Amendment and unjustified by any possible exception thereto.

III

A

In identifying which defendants were responsible for the wiretap's long continuation, the Court is aided not only by the extensive discovery and documentary evidence in this case but also by wide-ranging Congressional investigations concerning the surveillance program.[7] Despite the fact that recollections differ as to details, the following facts may be stated with certainty:

1.) President Nixon authorized the wiretap program and assumed personal responsibility for its operation.[8]

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[7] *See, e.g.*, Hearings on Dr. Kissinger's Role in Wiretapping Before Senate Comm. on Foreign Relations, 93d Cong., 2d Sess. (1974); Statement of Information, Committee on the Judiciary of the House of Representatives, 93d Cong., 2d Sess., Book VII, pts. 1-4 (1974); H.R. Rep. No. 1305, 93d Cong., 2d Sess. 146-50 (1974) (Judiciary Committee report on impeachment inquiry evidence on wiretap program).

[8] 9 Pres. Doc. 694 (1973) (statement of May 22, 1973 by President Nixon); Hearings on Dr. Kissinger's Role in Wiretapping, *supra*, note 7, at 11 (letter of President Nixon to Sen. Fulbright); Answer of Defendant Nixon to Second Amended Complaint, filed April 11, 1975.

The Court rejects Mr. Nixon's Motion to Dismiss, filed herein and grounded upon the assertion that his discretionary conduct in office presents a non-justiciable issue or a political

2.) Attorney General Mitchell signed the authorization form for the Halperin wiretap and occasionally received written summaries of the interceptions. At no time did he formally re-evaluate the fruits of the wiretap or the need for its continuance, as required by Justice Department regulations.[9]

3.) Dr. Kissinger, through Colonel Haig, provided Halperin's name to the FBI. Thereafter, Kissinger and Haig received written reports on the surveillance, but apparently considered oversight and termination responsibilities to lie with the FBI, the President, and the Attorney General. After May 1970, no further reports on the Halperin wiretap were sent to them.[10]

4.) FBI personnel monitoring the Halperin telephone conversations were not informed of the pur-

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question. Numerous recent decisions indicate that government officials are not immune from suit for alleged illegalities committed in office. *See, e.g., Wood* v. *Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes, supra; Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1974). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 163, 2 L.Ed. 60 (1803).

[9] Letter of William D. Ruckelshaus to John N. Mitchell May 23, 1973, *Statement of Information, supra,* note 7, book VII, pt. 1, at 177-80; *id.* at 157-76, 187, 192-93; *see also* note 6 *supra.*

[10] Deposition of Henry A. Kissinger at 36-38, 76-78, 81-86; Deposition of Alexander M. Haig at 92-96, 106-09, 148-49, 151-53, 158-60; Hearings on Dr. Kissinger's Role in Wiretapping, *supra* note 7, at 173, 185-86, 214-15, 269-74.

pose of the surveillance. Nor were guidelines established concerning what to look for or how to minimize intercepted conversations. During the twenty-one month surveillance, no use was made of regular investigative techniques, such as interviews or lie detector tests.[11]

5.) During the period of the wiretap, defendants Haldeman and Nixon were aware of the fact that no information was being obtained relating to leaks and that much nonpertinent information was being gathered. These defendants took no affirmative action to terminate the surveillance or to reduce its scope.[12]

6.) H. R. Haldeman received and disseminated wiretap reports and information during the period between May 1970 and May 1971. Some of the material was apparently used for partisan political purposes.[13]

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[11] Deposition of Courtland J. Jones at 7, 14, 26; Deposition of Ernest Belter at 38, 43, 57; Deposition of William C. Sullivan at 131; Hearings on Dr. Kissinger's Role in Wiretapping, *supra*, note 7, at 132-38, 153-54, 158.

[12] Deposition of H. R. Haldeman at 43-44, 56-64; Deposition of Richard M. Nixon at 133-35. In a Feb. 23, 1973 meeting with counsel John Dean, President Nixon noted, "But the taps were [bad], too. They never helped us. Just gobs and gobs of material; gossip and bull . . . . The tapping was a very, very unproductive thing. I've always known that . . . [I]t's never been useful in any operation I've ever conducted." Statement of Information, *supra*, note 7, book VII, pt. 4 at 1754.

[13] *See, e.g.*, Summary Letter of May 14, 1970, May 18, 1970, June 11, 1970, June 23, 1970, January 29, 1971.

From this factual base, the liability and responsibility of certain defendants emerges: former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; H. R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification.

As to these defendants, no objective good faith defense is available. The Court finds their activities relating to the wiretap continuance unreasonable and in violation of established Fourth Amendment rights. *See Zweibon, supra,* 516 F.2d at 670-73; *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339, 1347-48 (2d Cir. 1972). Nor can these defendants claim absolute immunity for their excessive improper actions. *Compare Imbler* v. *Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution* (D.C.Cir. 1976).

As for any contention of subjective good faith, the undisputed record in this case controverts such a defense. In order to show good faith,

> "The official himself must be acting sincerely and with a belief that he is doing right, but an act violating [citizens'] constitutional rights can be

> no more justified by ignorance or disregard of *settled, indisputable law* . . . than by the presence of actual malice." *Wood* v. *Strickland*, 420 U.S. 308, 321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975) (emphasis supplied); *see also Zweibon*, *supra*, 516 F.2d at 671 n. 274.

The evidence here reflects a twenty-one month wiretap continuance without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents.

While there may be varying degrees of involvement of these individual defendants, the Court finds under all the circumstances presented that a subjective good faith defense is unavailable. Regardless of intention, they violated plaintiffs' basic, constitutional right to freedom from unreasonable search and seizure. Like any other citizen, these officials are charged with knowledge of established law and must be held accountable for personal misconduct. *See Wood* v. *Strickland*, *supra*, 420 U.S. at 322, 95 S.Ct. 992. The federal defendants named above are liable in compensatory damages to plaintiffs, such damages to be determined after further briefing by the parties. *See Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619.

B

Plaintiffs have no objection to the dismissal of the complaint as to Mr. Magruder. Further, there has

never been any allegation of personal liability of the current FBI Director, who did not even hold office during the events at issue. The remaining defendants in this lawsuit are entitled to summary judgment.

As has been noted, Dr. Kissinger and Colonel Haig provided Mr. Halperin's name to the FBI since he appeared to meet the criteria established for those suspected of leaking classified information. Reports were then furnished to them concerning the surveillance, but they regarded the "triumvirate", in Haig's words,—Nixon, Mitchell, and Hoover—as responsible for determining when to terminate the wiretap. After a period, they received no information on the Halperin matter. In view of their inactive role and the lack of oversight authority vested in Kissinger and Haig, summary judgment as to these defendants is appropriate.

Although Mr. Sullivan of the FBI played a central role in the Halperin wiretap, his actions appear to have been both reasonable and grounded in good faith. Early in the course of the surveillance, he recognized that little useful or relevant material was being gathered from the surveillance. Accordingly, he recommended discontinuance of the Halperin wiretap. He repeated this recommendation on a number of subsequent occasions. *See* Memorandum of W.C. Sullivan to C. D. DeLoach, June 20, 1969; Letter of William C. Sullivan to Mr. Hoover, July 8, 1969. The fact that his entreaties were rejected does not give plaintiffs a Fourth Amendment cause of action against him.

The liability of Mr. Mardian is premised upon his after-the-fact efforts in allegedly concealing the wiretap records. Such actions, however reprehensible, do not constitute a fresh violation of plaintiffs' Fourth Amendment rights. Accordingly, the motion for summary judgment as to defendant Mardian will be granted.

Plaintiffs have sought to keep Mr. Ehrlichman in this action based upon his role as the "conduit" of information for the President and by virtue of a memorandum written in late 1970 or early 1971 concerning use of the wiretap material to anticipate the actions of political opponents. No allegation is made or substantiated that he had any responsibility for the initiation, continuation, or termination of the Halperin wiretap. Nor is mere knowledge of the wiretap program or any after-the-fact activity on his part sufficient to result in liability. Without a cause of action under Title III, any dispute as to Ehrlichman's precise role in "disclosing, using or procuring" intercepted communications, *see* 18 U.S.C. § 2520, becomes moot. For these reasons, defendant Ehrlichman is entitled to summary judgment.

The final defendant, Chesapeake and Potomac Telephone Company, argues persuasively that it played no part in selecting any wiretap suspects or in determining the length of time the surveillance should remain. It overheard none of plaintiffs' conversations and was not informed of the nature or outcome of the investigation. As in the past, C&P acted in reliance upon a request from the highest Executive

officials and with assurances that the wiretap involved national security matters. Under these circumstances, C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation.

IV

In summary, the Court finds that there is no cause of action available to plaintiffs under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 for the wiretapping activities complained of herein; that the wiretapping was unreasonable under the Fourth Amendment; that defendants Nixon, Mitchell and Haldeman share joint liability for the Fourth Amendment violations and cannot avail themselves of any good faith defense; and that summary judgment is appropriate as to the remaining defendants in this action. Further briefing will be necessary on the matter of damages. Within twenty days, counsel for the various parties shall submit proposed orders implementing this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

D.C. Civil Action No. 1187-73

[Filed Jul. 12, 1979]

No. 77-2014

MORTON HALPERIN ET AL., APPELLANTS

v.

HENRY KISSINGER ET AL.

No. 77-2015

MORTON HALPERIN ET AL.

v.

HENRY KISSINGER ET AL., RICHARD M. NIXON, JOHN N. MITCHELL, and H. R. HALDEMAN, APPELLANTS

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WRIGHT, Chief Judge, ROBINSON, Circuit Judge, and GESELL,* District Judge

JUDGMENT

These causes came on to be heard on the record on appeal and cross-appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court is affirmed in part and reversed in part, and these cases are remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: July 12, 1979

Opinion for the Court filed by Chief Judge WRIGHT.

Concurring opinion filed by District Judge GESELL.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

APPENDIX E *

THE WHITE HOUSE
WASHINGTON

CONFIDENTIAL May 21, 1940

MEMORANDUM FOR THE
ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other

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* These materials were included as an Appendix to the decision of the court of appeals in *Zweibon* v. *Mitchell*, 516 F.2d 594, 673-675 (D.C. Cir. 1975).

countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct[ed] to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

/s/ F. D.R.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

July 17, 1946

The President,

The White House.

My dear Mr. President:—

Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

> "You are therefore authorized and directed in such cases as you may approve, after investiga-

> tion of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the oustanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two

most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

/s/ TOM C. CLARK
Attorney General

July 17, 1947 [*sic*]

I concur.

/s/ HARRY S. TRUMAN

ADMINISTRATIVELY
CONFIDENTIAL

THE WHITE HOUSE
WASHINGTON

June 30, 1965

MEMORANDUM FOR THE HEADS OF
EXECUTIVE DEPARTMENTS
AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In

my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used

for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

/s/ LYNDON B. JOHNSON

DEPARTMENT OF JUSTICE

November 3, 1966

MEMO NO. 493

TO: All United States Attorneys

FROM: Ramsey Clark
Acting Attorney General

* * * * *

* * * Present practice, adopted in July 1965 in conformity with the policies declared by President Johnson on June 30, 1965 for the entire Federal establishment, prohibits the installation of listening devices in private areas (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked. Intelligence data so collected will not be available for investigative or litigative purposes.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305572 137